IN THE

Supreme Court of the United States

October Term, 1977

No. 77-374

SAMUEL SLOAN,

Petitioner,

-against-

GERTRUDE J. BONIME, LILLIAN OLDEN, JOHN C. DOYLE, WILLIAM M. WISMER and CANADIAN JAVELIN LTD.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit, dated April 4, 1977, which summarily affirmed the decision of the United States District Court for the Southern District of New York, which approved the settlement of a class action, and to review the decision of the United States Court of Appeals dated June 7, 1977, which denied a petition for rehearing a suggestion that the rehearing be en banc.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit dated April 6, 1977 is reported as

Bonime v. Doyle, 556 F. 2d 554 (2d Cir. 1977) and is included as Appendix A to this petition. The decision of the United States Court of Appeals for the Second Circuit dated June 7, 1977, which denied a petition for a rehearing and a suggestion that the rehearing be en banc, is unreported and is included as Appendix B to this petition. The decision of the United States District Court for the Southern District of New York, which approved the settlement of the class action, is reported as *Bonime v. Doyle*, 416 F. Supp. 1372 (S.D.N.Y. 1976) and is included as Appendix C to this petition.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was entered on April 6, 1977. A petition for a rehearing and a suggestion that the rehearing be en banc was denied on June 7, 1977. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The time within which to apply for a writ of certiorari to bring this proceeding before the Supreme Court for review is ninety (90) days from June 7, 1977, pursuant to 28 U.S.C. §2101(c).

QUESTIONS PRESENTED

1. May the "tentative settlement class procedure" be adopted by the existing parties to a class action who are proponents of a settlement where the class consists predominantly of persons with relatively small individual claims under which the members of the class have the choice of (a) opting out (b) opting in and filing the proof of claim and (c) filing objections to the settlement and a brief in support thereof?

2. May the existing parties to a suit, consistent with the Rule 23(c)(2)(C) of the Federal Rules of Civil Procedure

and due process considerations, refuse to serve an objector to the settlement with any briefs, affidavits or other documents filed in court in support of the settlement or with any other court filings beyond the notice of the class certification and the proposed settlement?

3. May a class action be maintained in a United States District Court by a plaintiff who is a representative of the class of persons who purchased the stock of a certain corporation but who suffered no financial loss as a result of any such purchases?

4. Is an action brought on behalf of a class of all persons who purchased the stock in a certain corporation over a period of four and one half years unmanageable and unmaintainable under Rule 23 of the Federal Rules of Civil Procedure?

5. Is a notice to the members of a class in a class action of a proposed settlement inadequate which fails to appraise the class members of the formula by which their losses will be computed or that many members of the class will be entitled to no recovery whatever or that the entire judgment entered upon approval of the settlement will be paid by the corporate defendant rather than by the individual defendants?

6. Is the notice to the class of a proposed settlement inadequate which fails to provide the members of the class with a reasonable basis for determining what recovery, if any, they will receive if the proposed settlement is approved?

7. Does a district court have the authority to enter an injunction enjoining all members of the plaintiff class who did not opt-out, whether or not they have filed proofs of claim and participated in the settlement, from instituting against any of the defendants any suit based upon any cause of action which arise out of any of the matters alleged in the action, whether known or unknown?

8. Rather than entertain this appeal in an action not

yet terminated, should the Court of Appeals have remanded or dismissed the appeal and postponed its determination of the questions presented until such time as the District Court had conducted the hearings it had expressed an intention to conduct and had made a final determination of the amount of the attorney's fees to be paid and the amount which each class member who filed a proof of claim will receive under the settlement and a final judgment has been entered accordingly from which appeals might be taken?

STATUTORY PROVISIONS INVOLVED

Rule 23 of the Federal Rules of Civil Procedure provides:

CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superrior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; actions conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each

member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings

be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

STATEMENT OF THE CASE

On November 29, 1973, the Securities & Exchange Commission suspended trading in all securities of Canadian Javelin Ltd. and simultaneously instituted suit against Canadian Javelin Ltd, and its officers John C. Doyle and William M. Wismer.[1] On December 3, 1973, a suit was instituted by the law firm of Wolf, Popper, Ross, Wolf & Jones, specialists in prosecuting class action litigation. The plaintiff in this case was Gertrude J. Bonime ("Bonime"), who instituted this suit on behalf of herself and all other persons similarly situated. Named as defendants were John C. Doyle, William M. Wismer and Canadian Javelin Ltd., the same defendants who were named in the suit instituted by the S.E.C. The allegations of this complaint paralleled those made in the complaint filed by the S.E.C. and at the request of plaintiff's counsel both actions were assigned to the same judge. Later, that judge transferred this case to Judge Lasker.

At about the same time two parallel class actions were

1. That case produced one reported opinion: *S.E.C. v. Canadian Javelin Ltd.*, 64 F.R.D. 648 (S.D.N.Y. 1974) *appeal dismissed*, 538 F. 2d 313 (2d Cir. 1976), *cert. denied*, Dkt. No. 76-365 (Dec. 13, 1976).

instituted in Chicago by an attorney named Robert Plotkin. One of these suits was filed in the federal district court in Chicago and the other was filed in an Illinois State Court. Thereafter, the Bonime suit remained relatively dormant and a motion for a class action determination was not filed until January 17, 1975. Meanwhile, Mr. Plotkin actively litigated the cases he had brought in Chicago.

Plaintiff's motion for a class action determination was granted on consent after defendant Canadian Javelin Ltd. consented to a preliminary determination of the class "without prejudice to its right to assert, in a subsequent motion, after discovery relating to the class issue, any and all objections that may be appropriate with respect to the issues of class definition and class representation." In addition, plaintiff filed a motion to add Lillian Olden as a party defendant and this motion as well was granted on consent on January 23, 1975. Starting with March 5, 1975 plaintiff filed notices to take depositions to a total of four persons and in addition filed interrogatories directed to all defendants. At about this time, settlement negotiations commenced. Mr. Plotkin offered to settle his cases for approximately $2,000,000 payable to members of the plaintiff class. Counsel for Bonime, however, agreed to settle for the lower figure of $1.350.000. The defendants chose to accept the latter offer.

During this time, notices to members of the class of the certification of the class action as required by Rule 23 of the Federal Rules of Civil Procedure and this Court's decision in *Eisen v. Carlisle & Jacquelin.* 417 U.S. 156 (1974) had been stayed at the request of all parties. Consequently, when counsel for Bonime and counsel for defendants agreed to a settlement they were in a position to adopt the "tentative settlement class procedure'. Under this procedure, the members of the class are provided with notice of the proposed settlement at the same time that notice is provided of the class certification and the class

members given the opportunity to decide whether to opt-in or opt-out. The use of this procedure, which is condemned by the *Manual for Complex Litigation.* ¶1.45 p. 37, and other commentators, see e.g. "Developments in the Law—Class Actions", *Harvard Law Review.* May 1976, p. 1555-1558, forms a basis to objections listed under "Questions Presented" in the instant petition.

The terms of the proposed settlement agreed upon by the existing parties were incorporated in a Stipulation of Settlement which was submitted to the district judge for approval. A copy of the Stipulation of Settlement is included as Appendix D to this petition. The Stipulation of Settlement was not, however, sent to the members of the class and to this day the class members have not been notified of many significant provisions of the Stipulation of Settlement. For example, the Stipulation of Settlement defined two class periods and provided that persons who purchased the stock of Canadian Javelin Ltd. within these class periods will have their losses computed based upon the price at which the stock was sold if the stock was sold within that class period and if the stock was not sold within that class period the loss will be the difference between the purchase price and the price of 10 3/8 for the first class period and 7 1/8 for the second class period, these prices representing the closing price on the American Stock Exchange on the first day of trading after the termination of the respective class periods. Thus, plaintiff Bonime, who is a member of the class solely as a result of the purchase of 400 shares of Canadian Javelin Ltd. at the price of 8 3/8 during the first class period, has a profit as defined by the Stipulation of Settlement and, therefore, under the terms of the Stipulation of Settlement, has no right to participate in the settlement fund.

Under the procedure adopted in the Stipulation of Settlement and approved by the district judge, members of

the class were mailed a notice of the class certification and of the proposed settlement along with a proof of claim form. A copy of the notice is included as Appendix E to this petition. A copy of the proof of claim form is included as Appendix F to this petition. It can be seen from examining the proof of claim form that in order for a person to file a proof of claim and participate in the settlement he was required to (a) agree to be bound by the terms of any judgment that shall be entered upon the Stipulation of Settlement and (b) sign a general release discharging "defendant Canadian Javelin Ltd. and its past and present officers, directors, employees, agents, attorneys, subsidiaries, and affiliates . . . . from all claims which might have been asserted in connection with or which arise out of any of the matters alleged in the action, whether known or unknown". Thus, any person who wished to file an objection to the settlement was precluded from filing a proof of claim in view of the conditions placed upon such a filing.[2]

Petitioner, Samuel H. Sloan, upon receipt of the notice, filed a notice of appearance, a statement of objections and a brief in support thereof. The objections were concerned primarily with procedural matters and the fact that the notice of the proposed settlement did not provide sufficient information to make possible a reasonable estimate of how much the members of the plaintiff class would receive if the settlement was approved. Among other things, petitioner pointed out that warrants might be paid in lieu of cash and that since the stock of Canadian Javelin Ltd. was then suspended from trading by the Securities &

2. Counsel for defendants disagree with this interpretation and contend that a party may file a proof of claim and yet object to the settlement. Plaintiff's counsel, however, does not disagree and moved to dismiss an appeal by Guardian Management, S.A. on the ground that it had filed a proof of claim and, therefore, lacked standing to appeal. That appeal was later withdrawn.

Exchange Commission, these warrants might well be worthless. In addition, Petitioner objected to vexatious litigation practices by Wolf, Popper, Ross, Wolf & Jones and contended that the requested attorney's fee of $260,000 was excessive and should not be allowed.

There were a number of other objectors, by far the most vigorous of which was Robert Plotkin, who filed voluminous papers in opposition to the settlement. Plotkin's objections were understandable in view of the fact that approval of the settlement in the Bonime case would virtually extinguish the two class actions he had brought in Chicago and would deprive him of the substantial attorney's fees he had hoped to gain upon successful prosecution of those suits. Judge Lasker gave Plotkin considerable latitude to present his objections, allowing Plotkin to continue to file affidavits and supporting memoranda in opposition to the settlement long after the cut-off date of September 29, 1975 set forth in the notice. In addition, Plotkin was notified of and attended addition hearings before Judge Lasker which none of the other objectors including Petitioner were told about. The decision subsequently rendered by Judge Lasker approving the settlement noted the appearance by Plotkin but did not note the appearance of Petitioner or of two other attorneys who had filed briefs in opposition to the settlement.

It took Judge Lasker until June 30, 1976 to make his decision approving the settlement. During the period between the September 29, 1975 cut-off date on papers filed by objectors and Judge Lasker's June 30, 1976 decision, plaintiff's counsel had filed numerous affidavits and memoranda in support of the settlement. Benedict Wolf, the supervisory attorney representing the plaintiffs, filed a 39-page affidavit dated October 8, 1975 setting forth an evidentiary basis for the settlement. He also filed supplemental affidavits dated October 9, 1975, October 15, 1975, November 17, 1975 and December 3, 1975.

Additional affidavits were filed by Robert M. Kornreich, an attorney working under Wolf's supervision, by Irving Golomb, Counsel for Canadian Javelin Ltd., and by Roger F. Murray, a purported expert on securities trading who had been retained by the proponents of the settlement. All these affidavits were filed after the September 29, 1975 cut-off date and long after Petitioner had filed his notice of appearance which included a demand for service of copies of all filed papers. Nevertheless, not even a single paper or document of any kind was served by the existing parties upon Petitioner or upon any of the other objectors, with the exception of Mr. Plotkin, and, in addition, the affidavits and other documents which were filed in support of the settlement were maintained in Judge Lasker's chambers throughout the time that the motion for the approval of the settlement was pending and therefore could not be viewed in the public reference section of the courthouse. In an effort to keep track of the progress of this case, Petitioner went to Judge Lasker's chambers and asked to see all of the filed documents but was never shown the affidavits described above which set forth the evidentiary basis under which plaintiff's counsel was contending that the settlement was fair and adequate. Thus, prior to the publication of Judge Lasker's opinion approving the settlement, Petitioner did not know and had no way of knowing of the grounds proffered by plaintiff's counsel in support of the settlement.

After Judge Lasker's decision approving the settlement, a proposed judgment was submitted by the proponents of the settlement but a copy of this proposed judgment was never served on either Petitioner or any of the other objectors. In addition, the judgment which Judge Lasker signed, which is included as Appendix G to this petition, was not served upon Petitioner. As a result, Petitioner very nearly defaulted in this appeal. Fortunately, however, Judge Lasker extended by thirty days the time of

Petitioner to file his notice of appeal without which the instant appeal would not have been possible.

Two other appeals were filed: one by Plotkin and the other by Guardian Management, S.A. Plotkin's appeal was later withdrawn under a stipulation in which Canadian Javelin Ltd. agreed to pay Plotkin legal fees in connection with his Chicago suits. The appeal of Guardian Management, S.A. was withdrawn as well when the attorneys to the existing parties agreed to a stipulation which permitted Guardian Management, S.A. to litigate certain issues before Judge Lasker and to defer its right to appeal on all issues to a later date. Although Petitioner wanted to have the same deal which was given to Guardian Management, S.A., plaintiff's counsel was not agreeable and as a result Petitioner was isolated as the only appellant. Undoubtedly plaintiff's counsel decided it was strategically advantageous to force Petitioner to go forward with his appeal in view of Petitioner's poor record of success in the Second Circuit.

On appeal, the United States Court of Appeals for the Second Circuit summarily affirmed Judge Lasker's decision and this petition for a writ of certiorari follows.

REASONS FOR GRANTING OF THE WRIT

Petitioner submits that this petition for a writ of certiorari should be granted inasmuch as a decision of the United States Court of Appeals for the Second Circuit has decided a federal question in a way in conflict with applicable decisions of this Court and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Petitioner submits that any or all of the following grounds provide ample basis for granting this petition for writ of certiorari and that summary reversal of the decision of the Court of Appeals may be appropriate.

I

PLAINTIFF BONIME SUFFERED NO INJURY AS A RESULT OF HER STOCK PURCHASES OF CANADIAN JAVELIN LTD. AND HENCE SHE MUST BE DISMISSED AS A PLAINTIFF WHICH IN TURN REQUIRES DISMISSAL OF THIS ACTION AS IT RELATES TO THE FIRST CLASS PERIOD.

As noted previously, individuals who wished to participate in the settlement were required to file a proof of claim on a proof of claim form provided with the notice. Subsequently, approximately 3500 proofs of claim were filed but to date no effort has been made to tabulate them and there has been only preliminary processing and alphabetization. Nevertheless, Petitioner requested the opportunity to examine these proof of claim forms while this case was pending on appeal. A similar request had been made by Mr. Plotkin when this case was pending in the United States District Court and Plotkin had filed a formal motion requesting this relief, but this request was denied by Judge Lasker. At the appellate level, plaintiff's counsel protested vehemently when Petitioner asked to see the proofs of claim as plaintiff's counsel had done in the District Court. However, the proof of claim forms were in the custody of defendant's counsel and defendant's counsel agreed to permit them to be examined. Petitioner was particularly interested in examining the proof of claim forms filed by plaintiffs Bonime and Olden. He was able to locate Bonime's proof of claim but after an exhaustive search lasting approximately five hours he was never able to locate Olden's claim, assuming one exists. An examination of Bonime's claim shows that she purchased 400 shares of Canadian Javelin Ltd. at 8 3/8 on May 27, 1970. Since 8 3/8 is less than 10 3/8, which was the closing

price on the American Stock Exchange on the first day of trading after the end of the first class period, Bonime did not suffer a loss as defined by the Stipulation of Settlement and, therefore, may not participate in the settlement fund. The status of plaintiff Olden remains unclear.

In its brief to the Court of Appeals, plaintiff's counsel claimed that Petitioner had "conveniently" failed to locate Olden's claim which, according to this brief, shows a loss as defined by the Stipulation of Settlement. Petitioner has since communicated with both plaintiff's and defendant's counsel with regard to this matter. Mr. Golomb, the attorney for Canadian Javelin Ltd., who has custody of the 3500 proof of claim forms, has advised Petitioner that he has never seen the Olden claim and does not know where it is or if it exists and that when he inquired of plaintiff's counsel regarding this matter, he received an evasive answer. Mr. Kornreich of plaintiff's counsel has told Petitioner that he will not discuss anything regarding the merits of this case and that he will not permit Petitioner to see a copy of Olden's claim and will not even state whether such a claim has been filed. He did, however, say that the statements made in his brief to the Court of Appeals were true and that he will respond to this point in writing in his answer to the instant petition for a writ of certiorari. Accordingly, Petitioner requests this Court to order plaintiff's counsel to produce a copy of Olden's claim so that a determination can be made of whether Olden suffered injury as a result of the activities alleged in the complaint. Petitioner submits that if plaintiff's counsel is unable or unwilling to demonstrate that Olden has been injured, then applicable decisions of this Court require the dismissal of this action.

In any event, the brief by plaintiff's counsel to the Court of Appeals conceded that Bonime did not suffer any loss in her stock purchases of Canadian Javelin Ltd. and that she will not recover any part of the settlement fund.

Nevertheless, plaintiff's counsel contended that this circumstance does not require the dismissal of Bonime as a plaintiff or the setting aside of the settlement approved by Judge Lasker. In support of this contention, plaintiff's counsel argued: (a) that Petitioner has no standing to request the dismissal of the complaint or the dismissal of Bonime as a plaintiff and (b) plaintiff's status is to be judged at the time of the class certification and does not depend on her ability to ultimately prove her entitlement to relief. In support of the latter proposition, plaintiff's counsel cited this Court's decision in *Sosna v. Iowa*, 419 U.S. 393 (1975) as well as *Dorfman v. First Boston Corporation*, 62 F.R.D. 466 (1974).

In response to these points, Petitioner submits that the fact that the action instituted by plaintiff Bonime has resulted in the entry of a judgment under which Petitioner, among other things, is enjoined from instituting or prosecuting any suit against the named defendants, is sufficient to give Petitioner standing to request the dismissal of Bonime as a plaintiff. This is particularly true since the named defendants never filed any effective opposition to this suit, never filed a motion to dismiss, never objected to Bonime's standing as a plaintiff, and consented to every application filed by plaintiff. The reason for this is, of course, that the defendants have gotten an exceptionally good deal in the settlement of this suit because in return for the payment of the relatively small sum of $1,350,000 they have obtained virtual immunity from suit based upon activities lasting over a period of four and one half years which resulted in civil injunctive suits filed by the Securities & Exchange Commission as well as criminal informations returned against defendant John C. Doyle and other persons connected with Canadian Javelin Ltd. in the Canadian courts. Since there are strong reasons for which it is contrary to the interests of Canadian Javelin Ltd. to question the status of Bonime as a plaintiff, the courts

should hear objections from persons such as Petitioner. As to the second point, Petitioner contends that the fact that plaintiff's counsel was in the unique position to know that its own client had suffered no injury as a result of the activities of Canadian Javelin Ltd. at the time it instituted suit and at the time it filed a motion for a class certification, requires the dismissal of Bonime as a plaintiff and the dismissal of this action with respect to the first class period, notwithstanding the class certification.

It is noteworthy that this is not the first time that the law firm of Wolf, Popper, Ross, Wolf & Jones filed a class action on behalf of a representative plaintiff who was subsequently found to have suffered no injury. In *Leonard v. Merrill Lynch*, 64 F.R.D. 432, 434-435 (S.D.N.Y. 1974) Mr. Kornreich contended that even though his client had suffered no injury resulting from the actions of the defendants, his client could nevertheless sue as the representative of those persons who did suffer injury because of the actions of the defendants. This contention was rejected by Judge Pierce. In the instant case, Mr. Kornreich is on the same side of the same issue but he argues that the fact that the class action has already been certified compels a different result. Petitioner disagrees and submits that the appropriate remedy under the circumstances may be to require Mr. Kornreich and the law firm of Wolf, Popper, Ross, Wolf & Jones to compensate purchasers of Canadian Javelin Ltd. stock during the first class period for injuries resulting from this fictitious class action instituted in their behalf. The applicable authorities of this Court clearly require the dismissal of Bonime as a plaintiff. See *Warth v. Seldin*, 422 U.S. 490, 502 (1975) and *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 40 n. 20 (1976). Since Bonime is the sole representative of the class of persons who purchased shares of Canadian Javelin Ltd. from April 30, 1969 through May 31, 1972, this action with respect to injuries sustained

during that class period must be dismissed along with the dismissal of Bonime as a plaintiff. All that would remain would be the action related to those who purchased shares from June 1, 1972 through October 24, 1973, all dates inclusive. However, according to Wolf's affidavit in support of the settlement, the first fraudulent act during this period occurred on June 22, 1973 and therefore, assuming that Olden is a proper plaintiff, which has not yet been established, it would be appropriate to narrow this action to cover the period from June 22, 1973 until October 24, 1973, which would enable this action to satisfy the manageability requirements of Rule 23 of the Federal Rules of Civil Procedure even though it would set back the aspirations of plaintiff's counsel to gain a substantial legal fee as a result of representing a much broader class of purchasers.

II

THE JUDGMENT SHOULD BE VACATED AND THE ACTION REMANDED FOR RECONSIDERATION AT SUCH TIME AS PLAINTIFFS' AND DEFENDANTS' COUNSEL SERVES A COPY OF ALL FILED PAPERS UPON THE OBJECTORS AND GIVE THEM A MEANINGFUL OPPORTUNITY TO RESPOND.

As noted previously, the proponents of the settlement filed voluminous materials none of which was available for view by Petitioner or by any of the other objectors, save Mr. Plotkin, until Judge Lasker made his decision. Petitioner has considerable evidence in his possession which proves the falsity of numerous statements made by Wolf in support of the settlement. For example, petitioner has in his possession press releases based upon a news conference

given by Fernando Manfredo, the Minister of Commerce and Industries of the Republic of Panama, on June 20, 1973, in which Manfredo stated that the government of Panama was considering kicking out Canadian Javelin Ltd. and was thinking of mining the copper properties for which Canadian Javelin Ltd. had an exploration concession, itself. This material directly controverts the statements made in Wolf's affidavit upon which Judge Lasker relied that Canadian Javelin Ltd. had no way of knowing until several months later about the possibility of difficulties with the Panamanian government. However, Petitioner did not file this and other documentary material which controverts numerous statements made in Mr. Wolf's affidavits for the simple reason that Wolf failed and refused to serve any of his court filings upon Petitioner and therefore Petitioner had no way of knowing of the evidentiary basis for Wolf's claim that the settlement was fair. Recently, there has been an exchange of correspondence concerning the fact that to this day plaintiff's counsel refuses to serve any papers upon Petitioner in spite of the fact that Petitioner has been actively litigating this case. A copy of a complaining letter by Petitioner to Judge Lasker is included as Appendix H to this petition and a copy of Mr. Kornreich's letter in response in which he states that he has not served Petitioner with papers in the past and that he will not do so in the future is included as Appendix I to this petition. Subsequent to this exchange of correspondence, Petitioner has learned that Judge Lasker has awarded a legal fee of $260,000 upon the request of plaintiff's counsel. This decision has been reported as *Bonime v. Doyle*, CCH Fed. Sec. Law Rep. ¶96,113 [Current Binder] (decided July 21, 1977). This decision mentions Petitioner by name even though neither Petitioner nor any of the other objectors were served with a copy of plaintiff's counsel's fee application and, therefore, noone other than the defendant

had a meaningful opportunity to oppose plaintiff's request. Defendant Canadian Javelin Ltd. did not oppose the award of the fee, which is not surprising inasmuch as the fee will be deducted from the settlement fund which Canadian Javelin Ltd. has agreed to pay. Incidentally, Judge Lasker stayed any payment of counsel's fees pending the disposition of this petition for writ of certiorari.

It is not disputed that Petitioner, who timely filed a notice of appearance and a statement of objections to the settlement, was not served with any of the papers filed in support of the settlement. Therefore, Petitioner was deprived of a meaningful opportunity to oppose the settlement and under Rule 23 (c)(2)(C) of the Federal Rules of Civil of Procedure and due process considerations, the judgment approving the settlement should be vacated and this action should be remanded. See e.g. 89 *Harvard Law Review* p. 1485 (May, 1976); *McBroom v. Western Electric Co.*, 18 Fed. Rule Serv. 2d 1200, 1203 (M.D.N.C. 1974).

III

THE ADOPTION OF THE "TENTATIVE SETTLEMENT CLASS" PROCEDURE IN THIS CASE WAS A VIOLATION OF DUE PROCESS PRINCIPLES AND RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The summary order of affirmance issued by the Court of Appeals cites two cases: *State of West Virginia v. Chas. Pfizer & Co.*, 440 F. 2d 1079, 1985 (2d Cir.) *cert. denied sub nom. Cotler Drugs v. Chas. Pfizer & Co.*, 404 U.S. 871 (1971) and *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 468 (2d Cir. 1974). Both of these were cases where the Second Circuit approved of the use of the tentative settlement class procedure. However, as a matter of due process, the principles which apply to those cases do not

apply here. The reason for this lies in the composition of the plaintiff class. In the instant case, the plaintiff class consists of all persons who purchased stock in Canadian Javelin Ltd. over a period of four and one half years. Canadian Javelin Ltd. was a low-priced highly speculative security traded on the American Stock Exchange. It turns out, not surprisingly, that the plaintiff class consists predominantly of persons whose total purchases amounted to not more than a few hundred shares and who suffered a loss of less than $1,000. It so happens that Petitioner purchased 46,810 shares during the second class period and suffered a loss amounting to $123,643.51. This explains the fact that Petitioner had a sufficient financial stake in this controversy as to justify filing a notice of appearance and devoting extensive time and effort in litigating this case whereas few other members of the class chose to object. The simple fact is that a person who suffered a loss amounting to less than $1,000 would find it prohibitively expensive to hire a lawyer to file a brief and to appear at the hearing before Judge Lasker, a course which was required for any person who wished to object to the settlement. In addition, the question of whether to opt-in or opt-out of the class action required sophisticated legal judgment for its resolution. Therefore, the use of the tentative settlement class procedure had the effect of depriving persons with claims too small to permit the retention of counsel of their due process rights. In the two cases cited by the Court of Appeals this problem did not exist. Those two cases were among the most massive and complex actions ever filed in the history of the federal judicial system. In both cases the plaintiff class consisted of governmental entities and some of the largest corporations in the United States. Hundreds of attorneys appeared in each of those cases and most of the largest and most prestigious law firms in the United States were involved. Every point of view was adequately represented and every

argument that could be made was no doubt presented. In the latter of the two cases, the district judge estimated that had it not been for the settlement the case would take from 5 to 11 years to try. See *City of Detroit v. Grinnell*, 356 F. Supp. 1380, 1389 (S.D.N.Y. 1972) *aff'd.* 495 F. 2d at 457. In the Chas. Pfizer case the agreed upon settlement was $100,000,000. In the Grinnell case the agreed upon settlement was $10,000,000.

In contrast to the enormous complexity of the above cases, which did not start out as class actions but had been consolidated by the Judicial Panel on Multi-District Litigation, stands the instant case which can be characterized as a garden variety securities fraud suit. Indeed, this case became more complicated rather than simpler as the result of the proposal of settlement. At an oral argument on July 23, 1976 Judge Lasker stated:

> "And I may say that the settlement of this case has been much more difficult for me than if I tried the bloody thing. I could have tried it in two or three weeks and finished.
>
> MR. GOLOMB: Except the question of damages, which you might have had a problem with.
>
> THE COURT: I would have left it to a jury." (Tr. p. 50).

In *TMT Trailer Ferry Inc. v. Anderson*, 390 U.S. 414, 424-425 (1968), a bankruptcy case which is relied upon in *State of West Virginia v. Chas. Pfizer & Co., supra.* 440 F. 2d at 1079, this Court discussed the law of settlement as follows:

> " . . . the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation."

Thus, it is clear that a case should not be settled where the settlement will cause more problems for the judge and more expenditure of judicial time than if the case were fully litigated. This is particularly true of a class action involving as it does the problem of absent plaintiffs and many other problems inherent in a class action. The *Manual for Complex Litigation* ¶ 1.45 p. 37 expresses this point as follows:

> "According to the weight of recent decision, this right of the small claimant to benefit without alone bearing the otherwise prohibitive cost of litigation is the most important procedural right secured by Rule 23. [citations omitted] The requirement of "opting-in" must, therefore, under Rule 23 as it is presently written, be regarded as a clear abuse of discretion. [citation omitted] ("Rule 23(e) places on the court the responsibility of protecting the absent parties.") Requiring a proof of claim under pain of exclusion or dismissal is the same thing as requiring class members to opt-in."

A more recent critique of the problems inherent in the tentative class procedure, which sets forth a number of pitfalls which were in fact encountered in the instant case and which demonstrates why it was erroneous for the district judge to adopt the tentative settlement class procedure here, is found in the May, 1976 *Harvard Law Review* p. 1555-1558, which states:

> "(a) *The Problem of the Tentative Settlement Class.*—The most elaborate settlement mechanism developed for class actions is the tentative set-

tlement class, in which the parties negotiate the definition of the class as well as the content of the relief. After agreement is reached the judge is asked to give preliminary approval and to authorize notice to class members, informing them of the terms of the settlement and, in effect, giving them four options: to opt-out; to accept the settlement and file a claim; to file a claim and remain in the class but to protest the settlement at a final approval hearing; or to do nothing, in which case they are bound without the chance to share in the recovery. The judge then holds a final hearing and rules on the appropriateness of the class definition and the adequacy of the settlement. If the judge rejects the proposal, or if an unexpectedly large number of class members opt out, the defendant may renounce his class stipulation and either oppose class treatment altogether or argue for a narrower definition.

Characteristically, parties using the tentative settlement class device have succeeded in minimizing judicial involvement pending completion of the settlement package. Apparently assuming that this absence of early supervision is an inherent part of the tentative settlement class process, the *Manual for Complex Litigation* concludes that tentative settlement classes 'should never be formed.' The *Manual's* basic arguments appear to be that this procedure fails to provide adequate representation of absentees' interests and, as a result, dilutes their bargaining power; delays the opportunity for class members to pursue individual litigation; and does not generate the information necessary for class members and the judge to evaluate intelligently the settlement proposal. Proponents of the tentative settlement

class respond to criticisms by contending that the mechanism is actually helpful to absentees, since it allows them to opt out with knowledge of the specific benefits of remaining in the class. Proponents also contend that settlements of large consumer class actions would not be possible without tentative settlement classes, and that problems of representation in a tentative settlement class are no worse than in any class settlement.

When all class members have individually recoverable claims, a tentative settlement class may be acceptable. In that situation, class members have a genuine option to opt out of the settlement and can benefit from specific knowledge of the amount of recovery they can expect from remaining in the class. Moreover, since a class member with a recoverable claim is likely to have his own attorney and an incentive to investigate his claim, he may be able to make an effective evaluation of the settlement despite the lack of information supplied by the negotiating parties. To the extent that absentees are able to exercise supervision over the settlement, the weak posture of the judge becomes less troubling. On the other hand, large claimants might be able to gather even more detailed information about the actual negotiations if there is early certification with the opportunity to intervene. In addition, an absentee might have his own suit delayed if all similar cases are consolidated for pre-trial proceedings and the judge refuses to allow any discovery until the tentative class settlement has been negotiated. On balance, however, these costs would appear to be offset by the advantage of being able to opt out with knowledge of the benefits of remaining in the class.

In contrast, when a significant number of class members' claims are non-recoverable or nonviable, the *Manual's* concerns about inadequate representation appear well-founded. Defendants may exploit the possibility of attorney-class conflict by shopping among attorneys who claim to represent the class until they find one with 'reasonable' demands. Intra-class conflicts are also likely since both the class attorney and the defendant will often have incentive to stipulate to an overly broad class. The class attorney may want to increase the size of the class in order to maximize his fee. If subsequent class or individual suits are probable, the defendant may want to save litigation costs by quieting all claims with a single payment.

When individual claims are small, absentees probably will be unable to protect themselves against inadequate representation. Small claimants will seldom be able to hire a lawyer to help them evaluate the offer. Opting out will often be an illusory choice, since the individual cannot afford to bring his own suit and will probably not wish to gamble that a sufficient number of other absentees will opt out to form a new class. Thus, effective judicial supervision becomes vital. The judge's lack of information, however, may prevent him from fulfilling his guardian role." [Citations and footnotes omitted]

It can be seen that a number of problems anticipated by this analysis did in fact arise in the instant case. The defendants were, in fact, able to shop among attorneys who claimed represent the class until they found the one with the most reasonable demands. In addition, the class attorney and the defendants stipulated to an exceptionally broad class consisting of purchasers of a stock over a four

and one half year period. With many suits, potential or threatened, pending against defendants, by accepting a proposed settlement, they have been able to quiet all claims with a single and relatively small payment. Plaintiff's counsel is satisfied because the defendants have consented to the award of a fee of $260,000, which is as much as plaintiff's counsel could expect to be awarded in a fully litigated case. Thus, the only parties left in the lurch are the class members including primarily those with relatively small claims who are being denied due process of law by the adoption of the tentative settlement class procedure. For this reason, under Rule 23 of the Federal Rules of Civil Procedure and due process considerations, this Court should reverse the decision of the Court of Appeals.

IV

THIS ACTION IS UNMANAGEABLE AND UNMAINTAINABLE UNDER RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

In most securities fraud actions, the plaintiffs allege a single, clearly identifiable act or statement which had the effect of defrauding investors such as a statement in a prospectus, for example. In the instant case, however, plaintiffs do not point to a single act or omission on the part of the defendants. Rather, they allege a course of conduct spanning a lengthy time period during which the defendants failed to disclose potential difficulties with the government of Newfoundland concerning the construction of a linerboard mill and subsequently failed to disclose problems arising from the refusal of the government of Panama to recognize the right of Canadian Javelin Ltd. to receive a copper exploitation concession. For example, during the second class period defendant officers of Canadian Javelin Ltd. claimed that the company was in the

process of constructing what would prove to be the world's largest copper mine whereas, in fact, no construction had commenced and an exploitation concession which was necessary to commence construction of the mine had never been granted by the government. The complaint alleges that because of the failure of the defendants to disclose the problems with the respective governments, the stock of Canadian Javelin Ltd. traded at an artificially inflated price which caused injury to its stock purchasers. However, a problem arises because of the lengthy time period over which plaintiffs allege that these fraudulent non-disclosures took place. For example, assuming that the allegations of the complaint are correct, a person who purchased the stock of Canadian Javelin Ltd. during this four and one half year period and subsequently sold the stock of Canadian Javelin Ltd. during the same time period did not suffer injury. The reason for this is that, although he paid too much because of the artificially inflated price at the time that he bought the stock, he also benefitted to the same degree because of the artificially inflated price which existed at the time he sold.

Of course, this analysis does not conform to the reality of the situation. For example, during the period from June 22, 1973 through October 24, 1973 the defendants issued a barrage of press releases containing optimistic pronouncements concerning their prospective copper mine in Panama. During this period, trading in Canadian Javelin Ltd. was exceptionally active and the price of tis shares rose from $7 to $18 on the American Stock Exchange. At other times, trading was relatively inactive and no press releases were issued. Obviously, when the stock was trading in September, 1973 at as much as $18 per share on a volume exceeding 100,000 shares per day, the price was artificially inflated to a greater degree than when the stock traded as low as $5 per share at the end of 1972 during a time when Canadian Javelin Ltd. was adopting a

low profile. What the plaintiff's counsel has done for the obvious purpose of broadening the class and raising its own legal fee is to include everyone who bought the stock over a lengthy time period and to request that any person who lost money as a result of his stock purchases be compensated. The defendants have acquiesced to this because it is in their interests to do so since by broadening the class they reduce their potential liability from securities fraud suits.

The principal response of plaintiff's counsel to the above argument is that Petitioner lacks standing to challenge the class certification. An analogous objection has dealt with *infra*. It should be clear that the prosecution of the instant action constitutes an abuse of the class action procedure. A similar action was criticized by an appellate judge in *Green v. Occidental Petroleum Corp.*, 541 E. 2d 1335, 1342 (9th Cir. 1976) (Sneed, J., concurring in part) and those criticisms apply here. Consequently, the instant action should be dismissed as a class action as not being maintainable under Rule 23 of the Federal Rules of Civil Procedure.

V

THE NOTICE OF THE SETTLEMENT WAS INADEQUATE

The suggestions in the *Manual for Complex for Litigation*, which are generally followed by most district judges but were not followed by Judge Lasker, set forth specific points of information which the *Manual* states that members of the class must have in order to be able to make an informed evaluation of the settlement proposal. For example, page 40 of the *Manual* says:

> "The notice itself must adequately describe the proposed settlement and should include the best

available information concerning fees and expenses which may be deducted from the gross amount together with an estimated range of unitary recovery (e.g., amount per share, per unit, per dollar charged, and the like) that members of the class may expect to receive if the settlement is approved."

The notice to the class did not do this and to this day even the existing parties to this suit do not have more than a ball park figure of what proportion of their claims the members of the class will actually receive. The "gross loss" to the class, when calculated by the parties according to the formula suggested by the Eighth Circuit in *Harris v. American Investment Co.*, 523 F. 2d 220 (8th Cir. 1975) was $25.8 million during the first class period and $13.7 million during the second class period. The District Court's decision reflects the wide disparity in the estimates of the amount of losses suffered by the plaintiff class with one estimate being as low as $2.5 million and Mr. Plotkin, on the other hand, estimating the losses to be as much as $30 to $50 million. The existing parties to this suit could easily resolve this question by computing the claimed losses from the proofs of claim which they have in their custody. For strategic reasons, they have refused to do so and no effort has been made even to begin to tabulate these claims although they have been on file since January 1976. This is most unfortunate since Petitioner might well abandon his objections if it were to turn out that the conservative $2.5 million is correct.

After viewing a representative sample of the proofs of claim which have been filed, Petitioner's best estimate is that purchasers during the first class period will receive from 1% to 3% of their losses and that purchasers during the second class period will receive from 5% to 15% of

their losses.[3] Under the terms of the Stipulation of Settlement, the purchasers during the second class period receive a greater recovery based, it seems, on the fact that a stronger case can be made out on behalf of those purchasers. Purchasers during the second class period are entitled to two thirds of the settlement fund and, in addition, during the first class period the stock of Canadian Javelin Ltd. traded at a higher price, was more active and involved a broader degree of public participation and, in addition, the first class period was considerably longer than the second class period. No doubt, had purchasers during the first class period known that they stood to get only 1% to 3% of their provable losses upon approval of the settlement, many more would have objected or would have chosen to opt-out. Of course, many members of the class would also, no doubt, have preferred to accept the 1% to 3% settlement anyway because of their lack of financial capability of hiring an attorney to prosecute an individual claim against the defendants. As to the second class period, even the 5% to 15% recovery, which seems relatively generous, would no doubt have been considered inadequate because of the widespread publicity of the fraud during that period, resulting as it did in articles in the Wall Street Journal on October 25, 1973 and October 30, 1973 as well as articles in Barron's Magazine and other financial publications in addition to a suit filed by the Securities & Exchange Commission, a trading suspension by the Securities & Exchange Commission which lasted for more than one year, and a criminal information released in Canada. In short, the fraud committed by the defendants

3. The bulk of Judge Lasker's decision approving the settlement consists of his evaluation of the various estimates of the amount of loss suffered by the class. However, in *City of Detroit v. Grinnell, supra*, upon which he heavily relies, the judge's decision was based upon an actual computation of the proofs of claim filed. This is a much more logical procedure and Judge Lasker's reliance on purely speculative attempts to guess the amount of loss suffered by the class was erroneous.

was so notorious that had the notice stated that purchasers during the second class period were only going to get 5% to 15% of their provable claims, there can be little doubt that most of them would have strenuously objected to the settlement. As a matter of fact, even as it was, on the hearing date the courtroom was filled with objectors. However, Judge Lasker refused to permit anyone to speak who had not filed a brief in support of the objections by September 29, 1975 and, as a result, the record in this case leaves the misleading impression that there were relatively few objectors.

In addition, the notice did not state the formula by which losses would be computed as a result of which many persons to this day think that they are going to receive compensation for the losses they sustained whereas in fact they suffered no losses as defined by the Stipulation of Settlement. One person who may be laboring under a misapprehension with regard to this matter is plaintiff Bonime herself, who stands to receive nothing from this case, assuming she is not being paid to be a plaintiff.

An additional deficiency concerns the fact that the notice fails to state a fact which was undoubtedly known by the defendants at the time at which the notice to the class was prepared, which is that the entire judgment is to be paid by Canadian Javelin Ltd. Several of the objectors anticipated that this would happen and one complained that the settlement would do nothing more than take money out of one pocket and put it into another after the deduction of attorney's fees. This objector continues to be a stockholder in Canadian Javelin Ltd., which appears to be the case with most of the members of the class, and thus he contended that approval of settlement would not result in any net benefit to him. Clearly, more members of the class would have objected to this arrangement had it not been for the fact that it was not disclosed in the notice which was sent to the class members.

Further objections to the notice were made by persons other than Petitioner. For example, Guardian Management, S.A. cited a number of addition deficiencies of the notice which do not affect Petitioner and which, therefore, will not be raised here. However, it should be apparent from the foregoing that the notice was inadequate and, hence, the settlement based upon this notice should be vacated.

VI

THE DISTRICT COURT LACKED THE AUTHORITY TO PERMANENTLY BAR AND ENJOIN ALL MEMBERS OF THE CLASS WHO DID NOT OPT-OUT FROM INSTITUTING OR PROSECUTING ANY ACTION ASSERTING CLAIMS WHICH HAVE BEEN OR MIGHT BE ASSERTED ARISING FROM OR RELATED TO THE MATTERS ALLEGED IN THE AMENDED COMPLAINT.

It is the general rule that no one can be bound by an in personam judgment in litigation in which he was not a party. *Madison Square Garden Boxing v. Earnie Shafers,* slip. op. 5355, 5359 (2d Cir. Aug. 19, 1977) citing *Hansberry v. Lee,* 311 U.S. 32, 41 (1940); *Williamson v. Bethlehem Steel Corp.*, 468 F. 2d 1201, 1203-1204 (2d Cir. 1972), *cert. denied,* 411 U.S. 931 (1973). Yet here Judge Lasker did exactly that because under the judgment entered upon the Stipulation of Settlement members of the plaintiff class who have not appeared in this action and who may not even know about the existence of this action are enjoined from instituting any suit not only against the defendants but against any persons based upon any cause of action arising from matters alleged in the amended complaint. Judge Lasker clearly exceeded his authority when issuing this pervasive injunction.

Defendants have made it clear in their brief to the Court of Appeals and elsewhere that they consider this injunction to be in integral part of the settlement and if the injunction is vacated they may decide to withdraw their offer to settle. The reason for this is apparent in view of the broad benefits they derive from the injunction. In a decision in another district in the Second Circuit involving a roughly comparable situation in a stockholder derivative suit, a judge refused to approve a settlement because it contained a provision for a general release against the officers of the defendant corporation. See *Herbst v. IT&T*, 72 F.R.D. 85, 95 (D. Conn. 1976). At the hearing on a preliminary motion in the Court of Appeals in the instant case, Judge Anderson commented that the judgment was most unusual in that it contained a bar order and he criticized the judgment for this reason. Unfortunately, Judge Anderson did not sit on the panel which decided this appeal or else the result might have been different.

Since Judge Lasker clearly had no authority to enter the broad injunction contained in the judgment, the decision of the Court of Appeals affirming the judgment should be reversed.

VII

THE COURT OF APPEALS SHOULD HAVE DEFERRED ADJUDICATION OF THE QUESTIONS RAISED IN PETITIONER'S APPEAL UNTIL THIS LITIGATION HAD BEEN TERMINATED IN THE DISTRICT COURT.

Although the judgment entered by Judge Lasker upon approval of the settlement is denominated as a final judgment, it reserves jurisdiction over matters involving the administration of the settlement. In this case, however, the

matters involving the administration of the settlement form the crux of a variety of problems which will not come out until some future date. One type of problem concerns the fact discussed previously that many persons including plaintiff Bonime who have filed proofs of claim are not entitled to participate in the settlement fund and have not yet been informed of that fact. A related problem affects Petitioner since plaintiff's counsel is objecting to Petitioner's right to participate in the settlement fund. The Stipulation of Settlement provides that any person who has filed a proof of claim must be informed of any objections to said proof of claim within twenty days of the filing and must be notified of the right to a hearing. Pursuant to this provision, Petitioner has been notified that plaintiff's counsel objects to his participation in the settlement fund. However, the district judge has refused to schedule a hearing on the request by Petitioner and numerous other members of the class that the objections by plaintiff's counsel be overruled until such time as plaintiff's counsel requests that it do so. Thus far, plaintiff's counsel has refused to request that hearings be conducted. This leaves Petitioner in a state of limbo because he has no way of knowing whether plaintiff's counsel will succeed in having him excluded from participating in the settlement fund. Plaintiff's counsel has attempted to capitalize on this situation by offering to withdraw his objections to Petitioner's participation in the settlement fund if Petitioner will withdraw his appeal and his objections to the payment of attorney's fees to plaintiff's counsel. At other times Petitioner has made a similar proposal. The reason these negotiations never came to fruition concerns matters of timing. For example, prior to the time that Petitioner's brief was due in the Court of Appeals, Petitioner offered to settle this appeal on essentially the above described basis. Plaintiff's counsel rejected this offer. After Petitioner had filed his brief and plaintiff's brief was due, the tables were

turned and plaintiff's counsel made this offer which Petitioner refused until such time as Petitioner had the opportunity to see plaintiff's brief. At that point, plaintiff's counsel complained to the Court of Appeals that Petitioner had "renegued" on a settlement offer.

The fact that negotiations such as this would occur with potential adverse consequences to the plaintiff class, illustrates that this case should have been litigated fully in the District Court prior to appellate review. If the District Court decided that Petitioner would be allowed to participate in the settlement fund, it might be that Petitioner would not prosecute this appeal and the case would not now be before this Court. It should be pointed out here that Petitioner had no choice in the matter. Had Petitioner not taken this appeal and not made the objections he is making here, he would probably have been precluded from making them at a later date. It was the deliberate intention of plaintiff's counsel and the District Court that appellate review would be had of the order approving the settlement prior to the time of further proceedings and hearings. This was not proper and placed Petitioner in an unfair position. Consequently, the decision of the Court of Appeals should be vacated.

CONCLUSION

For all of the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SAMUEL H. SLOAN

Dated: New York, New York
September 6, 1977

APPENDIX A

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DATED APRIL 6, 1977

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of April, one thousand nine hundred and seventy-seven.

Present:
Hon. James L. Oakes, Circuit Judge.
Hon. Charles E. Wyzanski,
Hon. James S. Holden, District Judges.

GERTRUDE J. BONIME and LILLIAN OLDEN,
Plaintiffs-Appellees,

v.

GUARDIAN MANAGEMENT, S.A.,
Claimant-Appellant,

SAMUEL H. SLOAN,
Member of the Class-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the

Southern District of New York and was submitted on the briefs.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of Judge Lasker below, approving the settlement, *Bonime v. Doyle*, 416 F. Supp. 1372 (S.D.N.Y. 1976), be and it hereby is affirmed. In reviewing the appropriateness of a settlement approval, the appellate court may, and should. intervene only "upon a clear showing that the trial court was guilty of an abuse of discretion." *State of West Virginia v. Chas. Pfizer & Co.*, 440 F. 2d 1079, 1085 (2d Cir.), *cert. denied sub nom. Cotler Drugs v. Chas Pfizer & Co.*, 404 U.S. 871 (1971). On this standard Judge Lasker's evaluation of the proposed settlement, which required an "amalgam of delicate balancing, gross approximations and rough justice," *City of Detroit v. Grinnell Corp.*, 495 F. 2d 448, 468 (2d Cir. 1974), was plainly sufficient and proper.

James L. Dakes, U.S. Circuit Judge

Charles E. Wyzanski, Jr., U.S. District Judge

James S. Holden, U.S. District Judge

APPENDIX B
ORDER DATED JUNE 7, 1977 DENYING PETITION FOR REHEARING AND SUGGESTION THAT THAT THE REHEARING BE EN BANC

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventh day of June, one thousand nine hundred and seventy-seven.

Present:
Hon. James L. Oakes, Circuit Judge
Hon. James S. Holden, District Judge
Hon. Charles E. Wyzanski, District Judge

GERTRUDE J. BONIME, etc.,
Plaintiffs

v.

JOHN C. DOYLE, etc.,
Defendants-Appellees

v.

GUARDIAN MANAGEMENT, S.A.
. Claimant-Appellants
FAYE LURIE, etc.,
Objectors-Appellants
SAMUEL H. SLOAN,
Member of the Class Appellant

A petition for a rehearing having been filed herein by appellant, Pro Se, SAMUEL H. SLOAN,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventh day of June, one thousand nine hundred and seventy-seven.

GERTRUDE J. BONIME, etc.,
Plaintiffs

v.

JOHN C. DOYLE, etc.,
Defendants-Appellees

v.

GUARDIAN MANAGEMENT, S.A.,
Claimant-Appellant

FAYE LURIE, etc.,
Objectors-Appellants

SAMUEL H. SLOAN,
Member of the Class Appellant

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellant, Pro Se, SAMUEL H. SLOAN, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN, Chief Judge

APPENDIX C

OPINION OF THE DISTRICT COURT
DATED JUNE 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GERTRUDE BONIME and LILLIAN OLDEN,
Plaintiffs,

—against—

JOHN C. DOYLE, WILLIAM M. WISMER,
CANADIAN JAVELIN LIMITED,
Defendants.

MEMORANDUM
73 Civ. 5117

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LASKER, D. J.

This is an application pursuant to Rule 23(e) of the Federal Rules of Civil Procedure for approval of a proposed settlement of a class action. The merits of the plan are vigorously pressed by counsel for the pláintiff class and defendants and are challenged with equal strength by various objectors some of whom have an interest in two similar suits currently pending in the Illinois state and federal courts. Upon detailed review of the arguments and the testimony at hearing and the document submitted by each side, it is our conclusion that the settlement is fair and reasonable and should be approved.

I.

The Nature of the Action, the Parties and the Proceedings to Date

This action was commenced in December, 1973 against Canadian Javelin Limited (Javelin or the company), a Canadian corporation primarily engaged in the business of exploring and developing natural resources whose stock is traded on the American Stock Exchange, and two individuals who figure prominently in its management. The complaint, filed on behalf of all purchasers of Javelin stock from a point in early 1969 to late 1973, alleges violations of Sections 5 and 17 of the Securities Act, 15 U.S.C. §§77e and 77g, Section 10(b) of the Securities Exchange Act, 15 U.S.C. §78j(b) and Rule 10b-5, 17 C.F.R. §240.10b-5 by means of a course of conduct designed artificially to inflate the price of the company's stock which was never registered pursuant to Section 5 of the Securities Act.

The plaintiffs, Gertrude J. Bonime and Lillian Olden, purchased shares in Javelin during the period of the alleged wrongdoing. The individual defendants are John C. Doyle, director, controlling shareholder and Chairman of the

Executive Committee of Javelin, and William Wismer, director and President of the company.

The amended complaint particularly charges the defendants with a series of material misrepresentations and omissions in annual reports, press releases and filings with the Securities Exchange Commission and the American Stock Exchange designed to deceive the investing public with regard to Javelin's financial condition and business prospects. (§7) The allegations focus on two projects with which the company was involved during the period in question: a plan to develop a major facility in Newfoundland for the production of linerboard (the linerboard project) and a plan to exploit mineral deposits in the Cerro Colorado project). In Connection with the linerboard project, the amended complaint alleges that during the planning and construction stage the company issued a continuous series of materially misleading statements as to the true size and anticipated profitability of the project, the true cost and extent of necessary financing involved and "serious obstacles" encountered in bringing the project to fruition, particularly disputes with the government of Newfoundland. (§9) Secondly, it is alleged that at a later time the company misrepresented the status of $4,300,000. asserted to be due from the Newfoundland government in payment for the subsequent sale of the entire linerboard project to the government by showing the amount as a current asset, when in reality the obligation was disputed and the company had failed properly to pursue the matter. The defendants are also charged with engaging, during the same period, in a scheme to deceive investors as to the Cerro Colorado project, which centered on a large copper discovery in Panama, by issuing false and misleading statements as to the company's exploitation rights, the related feasibility studies and the financial arrangements to produce and market the initial output of the project. (§12) The plaintiffs allege that the company's right to develop the

ore deposits was highly speculative, that no feasibility studies or arrangements to finance the project existed and that marketing plans were still in the negotiation stage. (§14) It is asserted that the above misstatements or omissions resulted in artificially inflated prices for Javelin stock throughout the period and that the plaintiffs and all other purchasers of the stock would not have been required to pay as much as they did for their stock if the true facts had been known. (§16)

The defendants dany all the material allegations.

In April, 1974 plaintiffs moved for and obtained an order directing that a class action determination be made by July 14. By stipulation and order the parties obtained three extensions of this time limit, however, because they required further discovery to reach a judgment as to the appropriate boundaries of the class. When the motion for class action determination was filed in January, 1975, the defendants offered no objection on the condition that the determination would be preliminary and they reserved their right to petition the court to alter, amend or revoke the determination pursuant to Rule 23(c) (1), Federal Rules of Civil Procedure. On the basis of the discovery to that point the plaintiffs proposed a class to include all purchasers of Javelin stock between the dates of April 30, 1969, when the 1968 annual report containing the first allegedly misleading statements was issued, and October 25, 1975, the day on which the American Stock Exchange suspended trading in the company's stock for failure to make full disclosure concerning the copper project in Panama. The latter date was selected because while the suspension was in effect the Securities Exchange Commission filed an injunctive action against the defendants which resulted in a consent judgment providing, *inter alia*, for full disclosure of the company's affairs. Pursuant to this judgment and prior to the resumption of trading on January 25, 1975, the company issued a letter to its stockholders to comply with

the SEC order. On the strength of the presentation of the parties in the moving papers, the motion to determine the class was granted on February 7, 1975. Notice to the class was stayed pending further discovery which might affect the parameters of the class or indicate the desirability of creating sub-groups within the class. See, *Wolfson v. Solomon*, 54 F.R.D. 584, 593 (S.D.N.Y. 1971); *Fischer v. Kletz*, 41 F.R.D. 377, 386 (S.D.N.Y. 1966).

The parties submitted the proposed settlement for the court's consideration in July, 1975. By this time, more than one and half years since the complaint was filed, considerable discovery had taken place. Plaintiffs' attorneys had examined numerous documents relating to the events which form the subject of the complaint, received answers to one set of interrogatories and deposed four persons who played key roles in the linerboard project, the Cerro Colorado project, or both, including the defendant John Doyle. (§§14, 18 and 21, Wold Affidavit, October 8, 1975) On the basis of the facts revealed by this discovery, which indicated that there would be some problems of proof with regard to both liability and damages, plaintiffs' attorneys explored the possibility of settlement. Counsel for the defendants, for their part, though steadfastly denying the merits of the allegations, were also desirous of compromising the action to avoid the expense of continued litigation.

Being satisfied that the proposed settlement was worthy of consideration, the court ordered that notice be given of the class determination and of a hearing to be held on the fairness of the settlement. The order provided for notice by mail and publication. Prior to the hearing the proponents of the compromise filed affidavits and memoranda in support thereof and a total of eleven class members who opposed it submitted their objections in writing.

At the hearing on the merits of the settlement, the proponents offered the expert testimony of Dr. Roger F.

Murray, S. Sloan Colt Professor of Banking and Finance at the Graduate School of Business and Finance at Columbia University, on the question of provable damages should the plaintiffs prevail on the issue of liability at trial. Several objectors appeared and spoke against the settlement. Those objectors who have an interest in the concurrent Illinois litigation appeared by counsel and strenuously argued that the proposal be disallowed. Their counsel crossexamined Dr. Murray and presented a computer study to demonstrate that the potential recoveryof the class was far in excess of that estimated by Dr. Murray and the proponents, and that the sum offered in settlement was therefore grossly inadequate. Both the proponents and the objectors have, with court permission, submitted further affidavits, briefs and data in support of their respective positions.

II.

The Proponents' View

The affidavit of Benedict Wolf, lead counsel for the plaintiff class, sets forth in detail the facts upon which he contends that the settlement is fair. It is his view that, as discussed in detail below, it will be difficult to establish liability with regard to the first portion of the class period and that the possibility of success is more promising, but by no means assured, as to the later part. Even assuming that liability is shown, however, he appears generally to accept the analysis of the defendants' expert, Dr. Murray, who calculates that the maximum recoverable damages to this class is $2.5 million. In a separate affidavit, Dr. Murray sets forth the basis for this statement. A summary of their presentations follows:

Discovery revealed that the allegations of the complaint relate to two distinct segments of time. During the first

portion of the class period the defendants' activities cnetered on the development of the linerboard project; during the later part, the focus of activities was the Cerro Colorado project, and also the alleged misrepresentation as to the payment for the linerboard sale took place. With regard to the first period, the defendants are charged with misleading the public as to the prospects and progress of the linerboard project, undertaken with the consent and close involvement of the government of Newfoundland. The plaintiffs learned, however, that during this period the project in fact proceeded substantially on schedule and within the original budget estimates; that such obstacles as existed were arguably insignificant; and, although not disclosed by the company until issuance of a letter to its shareholders of May 31, 1972, the difficulties were the subject of a great deal of publicity in both Canadian and American media. Finally, it is asserted that Javelin's silence on the problems, which grew out of a dispute with the government that had developed into a political controversy in the Province between the two leading political parties, could very plausibly be defended as an exercise in sound business judgment as the project was dependent for its ultimate success on the good will of the government. Discovery also revealed that no liability could be established as to the Section 5 claim since there had been no public offerings of the unregistered securities within the applicable limitations period. (§§51-63; 82-84, Wolf Affidavit, October 8, 1975)

The case appears stronger with regard to the period following the May 31 disclosure, during which the bulk of the alleged wrongdoing occurred. In Wolf's view, however, even here the allegations that the company misrepresented the existence and content of encouraging feasibility studies by outside experts regarding the prospects for the Cerro Colorado project proved to be without foundation in fact. (§§36-39; 79, Wolf Affidavit, *supra*) He professes greater

confidence in proving misrepresentations and omissions as to the other aspects of this project, the status of the exploitation rights and of the preliminary marketing arrangements and an episode regarding the premature announcement of another concession in Panama, as well as the treatment of the $4.3 million owing from the government of Newfoundland for the purchase of the linerboard project. His discussion of the facts, however, conveys the distinct impression that any assessment of success must take serious consideration of the defendants' assertion of the truth of all the statements made, or the existence of a reasonable basis for them which seriously undercuts a claim of willfullness or recklessness.

For example, the allegation of misrepresentation with regard to the marketing arrangements for the Cerro Colorado project was undercut by the fact that very serious discussions were indeed underway with a major British concern at the time of the allegedly misleading released which, though arguably unduly optimistic—or rather, not fully enough qualified—made no untrue statements, were by no means manifestly misleading, and in fact did not, as alleged, convey the false impression that marketing arrangements had been solidified. (§§41-47; 81, Wolf Affidavit, *supra*) At trial the plaintiffs will thus have to convince a jury that the statements violated the law in a somewhat subtle degree, obviously a far more risky proposition than proving a patent lie. Similar problems existed particularly with regard to a claim that the company had prematurely announced the acquisition of another mineral concession in Panama. (§§48-50; 80, Wolf Affidavit, *supra*)

Even assuming that the plaintiffs do succeed in establishing securities law violations, they must, of course, prove damages. According to Wolf, the weakest aspect of the case on damages is, again, the early part of the class period, where proof of any damage at all is made difficult

by the fact that most if not all of the allegedly withheld information was publicly available through the media due to the highly publicized political dispute in Newfoundland centering on the relations between the company and the government. Thus it could plausibly be argued that the price of the stock throughout this period reflected the adverse information. The problem of proof of damages is further complicated by the fact that on the first day of trading following full disclosure by the company on May 31, 1972—trading was suspended from early March, 1972 to August 11, 1972 as a result of the sale of the project to the government of Newfoundland—the price was actually higher than the price when suspension began. (§87, Wolf Affidavit, *supra*)

With regard to recoverable damages for the later period, Wolf largely defers to the opinion of Dr. Murray. (§§89, 92, Wolf Affidavit, *supra*)

As stated above, Dr. Murray submitted an affidavit setting forth his views and also testified at the hearing. His credentials as an authority on the workings of the stock market are impeccable. His analysis is based on the proposition that distinction must be made between losses attributable to general market forces and trends and losses attributable to "unique characteristics of a particular company," and he assumes that "(i)f announcements and reports issued by the company had an effect on (Javelin's) price, that effect can be measured by the differential price behavior of the shares relative to . . . indexes of market price." (§§4 and 5, Murray Affidavit, October 7, 1975) In short, he attempts to factor out the amount of money lost by purchasers which is not attributable to general market trends.

To this end he plotted the rises and falls of Javelin's selling price during the class period and compared them to the averages of the same data of two comparable groups of stock, the S & P Low Priced Common Stock and the Value

Line Industrial Stocks. He concluded that in gross "the price experience of (the company) differed in no material respects from the price behavior of representative stocks in its risk class." (§12, Murray Affidavit, October 7, 1975) However, he allowed the possibility that a certain number of investors may have been induced to buy at premium prices by relatively high prices or spurts in market activity with no opportunity to sell before a drop ensued. He described three periods of such "activity premiums," periods in which activity in this security greatly exceeded the norm, and calculated that a total of roughly 2,500,000 shares were traded for an aggregate premium, i.e., price in excess of normal—of $6,;13,750. From this sum, he deducted the amount which, by his estimate based on his study of the records of the transfer agent, represented money paid by short-term traders who were in and out of the stock before the price dropped, a group he believes to comprise more than 50% of the excess activity in these periods. (§16, Murray Affidavit, *supra*) His adjusted total, after all these calculations, is $2,430,000., a sum which he believes "fully reflects the losses which might have been sustained by investors who were buying ... with reference to expected developments and not simply to make a quick turn on the market." (§17, Murray Affidavit, *supra*)

The position of counsel for the defense on this application is a simple one. They maintain confidence that they would prevail upon a full trial, but are desirous of settling to avoid the expense entailed in the conduct and preparation of a "long, difficult and complicated" trial. (Memorandum of Canadian Javelin, October 10, 1975 at p. 21) They maintain that in view of the limitations of plaintiffs' chances of success and probably maximum recovery, the settlement is more than fair.

III.

The Terms of the Proposed Settlement

The proposed stipulation of settlement defines the "entire class period" as the period from April 30, 1969 through October 24, 1973. This period is subdivided into a "first period", from April 30, 1969 through May 31, 1972, and a "second period" from June 1, 1972 through October 24, 1973. The first period encompasses the allegations centering on the development of the linerboard project and the second relates to the later activities. The defendants are to pay $1,350,000 into a settlement fund in such proportions as they agree among themselves. Any payment by the company may be either in warrants for its stock or in cash or a combination of the two; any payments by the individual defendants will be in cash. All class members who sustained a loss shall be entitled to a pro rata share of the settlement fund, with one-third of the fund allocable to the claims of class members who purchased during the first period and two-thirds to the claims of those who purchased in the second period. The weighted recovery reflects the proponents' assessment of the weight of the case with respect to each time frame. A "loss," for purposes of eligibility to participate in the fund, is defined as the difference between the purchase price of the shares and the greater of (i) the selling price of the shares or (ii) the closing price of the stock on the American Stock Exchange on August 10, 1972, the first day of trading after May 31, 1972, in the case of the first period, or on January 27, 1975, the first day trading was resumed on the American Stock Exchange after October 24, 1973, in the case of the second period. Profits earned from a sale of any stock which was purchased during the entire class period up to the date of mailing of the notice of the hearing are to be deducted from losses in computing the claim of each class member. In the

event of approval counsel for the plaintiffs will apply to the court for a fee of $260,000. plus expenses to be paid out of the fund.

Matters left open by the terms of the stipulation were finalized prior to the hearing: as between the three defendants, Canadian Javelin, by an action of the Board of Directors, has undertaken to pay the entire amount of the settlement fund in cash.

IV.

Objections

Of a class which numbers in the thousands only eleven individuals have voiced objections to the compromise. Three objectors, (the Lurie group or the Luries) have launched a well organized and rather acrimonious assault on the proposal. It is with their contentions that this portion of the memorandum is primarily concerned. The other eight, raise an assortment of issues challenging the substantive fairness of the plan which are dealt with at the end of this section.

The general principles which guide us in assessing the fairness, reasonableness and adequacy of a class action settlement are clear.

> "(T)he role of a court in passing upon the propriety of the settlement of a . . . class action is a delicate one . . . since '(T)he very purpose of a compromise is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation, the court must not turn the settlement hearing "into a trial or a rehearsal of the trial".' Rather . . . it must reach 'an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated' and 'form an educated estimate of the

> complexity, expense, and likely duration of such litigation . . . and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise.' " *Newman v. Stein,* 464 F. 2d 689, 691-92 (2d Cir.) *cert. denied,* 409 U.S. 1039 (1972); (citations omitted).

At the heart of the analysis is an evaluation of the strength of the plaintiffs' case. *City of Detroit v. Grinnell Corp.*, 495 F. 2d 448, 455 (2d Cir. 1974). This requires consideration both of the likelihood of establishing liability and the consequent probably reward in damages, balanced against the amount offered in settlement. *State of West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 740-41 (S.D.N.Y. 1970), *aff'd*, 440 F. 2d 1079 (2d Cir. 1971). Preliminarily, however, we must first consider a variety of procedural objections raised by the Lurie group, for considerations of the conduct of the settlement proceedings are also relevant to a determination of the fairness of the plan. *Newman v. Stein, supra,* 464 F. 2d at 692 and n. 8.

A. *The Objections of the Luries*

Fay Lurie and H. Haskell Lurie are the named plaintiffs in two similar actions, one in state and one in federal court, against these defendants in Chicago, Illinois.[2] Those actions allege very much the same wrongs as set forth in the complaint in this case and also purport to be class actions, although the proposed class periods are somewhat shorter. In neither has a class determination been made. Such a motion is currently pending, however, in the state case along with cross-motions for partial summary judgment.

Both of the Luries' cases were filed at approximately the same time as this one, in late 1973, so the Luries, too, have had an opportunity for fairly extensive discovery. Unlike the discovery by counsel for plaintiffs in this case, however, the Luries have been limited in their investigation of the merits of the case to examination of documents and an-

swers to interrogatories. (§5, Plotkin Affidavit, September 25, 1975) Moreover, the Luries' lead counsel, Robert Plotkin, engaged in settlement discussions with defendants' counsel during the period of such discussions in this case.

1. *Procedural Objections*

The Luries contend that this settlement proposal is defective on account of several alleged procedural flaws in its development and presentation to the class. They claim that contrary to the Recommendations of §1.46 of the Manual for Complex Litigation, a tentative class for settlement has, in effect, been created here; that the Notice of Class Determination, the Proposed Settlement and the Settlement Hearing (the Notice) was misleading in not explaining this fact and in misrepresenting the status of the Chicago litigation; and that the Notice imposed undue burdens on class members who desire to object to the settlement or to opt out. Finally, a persistent theme in the arguments of the Luries' attorney is that this settlement is the product of excessive bargaining leverage by the defendants, asserted by virtue of their ability to play the two attorneys, Plotkin and the class attorneys in this case, against one another and thereby obtain an unreasonably low settlement figure.

We disagree that a tentative settlement class has been formed in this case. The motion for class determination was granted in February, 1975, fully five months before the settlement was presented to the court, and if the settlement were disapproved, the class determination would remain in effect. See generally, 1 Pt. 2 Moore's Federal Practice, Manual for Complex Litigation, §1.46 at 54-57 (1975). It is true, however, that the motion was granted on consent of the defendants and subject to their right to raise objections at a later date. The order was thus conditional and subject to later revision, as it is expressly permitted to be by Rule 23 (c: (1), and consequently there is arguably some

similarity to the tentative class procedure criticized by the authors of the Manual. One of their concerns is the possibility that parallel settlement negotiations may be conducted with different purported class representatives. Apart from this problem, which we treat separately, the force of the Manual's critique of tentative classes has been considerably muted in this Circuit. In *City of Detroit v. Grinnell Corporation, supra,* 495 F. 2d at 465-66, the Court indicated that the principal concern of this portion of the Manual is satisfied where, as here, the class members receive an opportunity to appear at a hearing and challenge any aspect of the proposed settlement.

In light of the above, we disagree that the Notice was inadequate for failure to inform the class of the use of an allegedly tentative settlement class procedure. We also disagree that the Notice misrepresented the Chicago litigation. The Notice stated:

> *"OTHER LITIGATION*
>
> After this action was commenced, two stockholders started an action in the Federal District Court in Chicago (*Faye Lurie, et ano. v. Canadian Javelin Limited, et al.,* 73 C 3086) based generally on the same issues as are involved in this action, which case has remained dormant, and another action in the Circuit Court of Cook County, Illinois (*Faye lurie, et ano v. Canadian Javelin Limited, et al.,* 73 CH 7442) also based generally on the same issues as are involved in this case. In the latter action plaintiffs moved for a class action determination under Illinois Rules and for partial summary judgment and defendants cross-moved for complete summary judgment. The class action motion has been pending since July 12, 1974 and plaintiffs' partial summary judgment motion has been

pending since December 24, 1974, both without determination."

Although the Luries object to the use of the word "dormant" to describe the federal case in Illinois, their papers make clear that the state case has been the focus of their attention to date. It is in the latter action that the class determination and summary judgment motions have been made, and apart from their disputed claim that the discovery which forms the basis for these motions applies as well to the federal case, the Luries point to no independent activity in that action. There is a sharp controversy in the affidavits before us on the existence of an agreement among counsel that discovery in either case may be used interchangeably in both, a controversy which we cannot and need not resolve on this record. Whatever the truth of the matter, the important fact is that the Notice revealed the existence of both cases and any concerned class member could have inquired further had he desired to do so. Even accepting the Luries' contention that they are proceeding with the intent fully to prosecute both actions, the description in the Notice may not fairly be characterized as a misrepresentation; at most it is an inaccuracy far less serious than would be required to undermine a settlement.

The Notice required that to object to the settlement, a class member must "file a notice of intention to appear and a statement of the basis for objection, together with a memorandum of supportive authorities," and that to opt out, a class member must, in addition to simply requesting exclusion, provide data as to his purchases and sales of the company's stock. The Luries contend that these requirements create unnecessary burdens which discourage class members from exercising their rights. We recognize that such requirements may discourage objections or opting out of the class—although this would be disadvantageous, not advantageous to remaining members. We cannot agree, however, if indeed the Luries seriously mean to suggest it, that the inclusion of such requirements should bar approval of the settlement if it is otherwise fair and reasonable.

During the period in which the parties to this action were engaged in the discussions which ultimately led to the proposal under consideration, Plotkin was also attempting to work out a compromise of the Luries' actions. He was unsuccessful and now hints darkly that this settlement, if not collusive, is the product of the opportunities for coercion which inhere in a situation in which more than one class action is brought against defendants on the same cause of action.

The circumstances in which the instant settlement proposal was developed, with both Wolf and Plotkin contemporaneously attempting to resolve their respective suits, resemble the situation cricized by the Third Circuit Court of Appeals in *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F. 2d 30 (1971), where in a single purported class suit and prior to the designation of a class representative, defense counsel engaged in discussions with two different attorneys who both aspired to represent the class. The court observed that:

> "a person who unofficially represents the class furing settlement negotiations may be under strong pressure to conform to the defendants' wishes. This is so because such an individual, . . . knows that a negotiating defendant may not like his 'attitude' and may try to reach a settlement with another member of the class."
>
> * * *
>
> "The attorneys' fees and the prestige attendant upon probably apointment as class representative

are the rewards for the attorney who bargains successfully with the defendants." *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F. 2d 30, 33 (3d Cir. 1971).

The possibility that events transpired as Plotkin alleges is a troubling one, and it is the more so because, in contrast to the situation in *Ace Heating*, the possibility arises not out of premature settlement negotiations in a single class action, over which a court could exercise a considerable measure of control, but out of the pendency or more than one suit in two entirely different jurisdictions, a situation which seems largely beyond the power of a court to prevent. This is, however, simply one of a number of novel and knotty problems arising from the unique attorney and client relationship in class action litigation, where with much more frequency than in traditional ligigation the interests of a class attorney may diverge from that of his clients. See, e.g., *Saylor v. Lindsley*, 456 F. 2d 896, 900-01 (2d Cir. 1971). Moreover, it by no means follows from the fact of contemporaneous negotiations of the two cases that undue leverage was exercised by the defendants against either group. Perhaps as courts become increasingly sensitive to the myriad complexities of class litigation these problems will be earlier perceived and, to the extent possible, headed off in the process. Confronted with these contentions at this stage of the proceedings a court must assume the burden to insure that the interests of individual class members are protected and be "doubly careful" in assessing the merits of the plan; see *Ace Heating & Plumbing Co. v. Crane Co., supra*, 456 F. 2d at 900-01; but it would not be in the interests of the class to disapprove a settlement merely because the possibility of abuse existed if the proposal itself is fair and reasonable. As explained below, our examination of the merits of this agreement leads us to conclude that it is fair and reasonable and,

consequently, that it is not the product of untoward negotiating leverage.

2. *Substantive Objections*

The Luries vigorously contend that this settlement is grossly unfair to the class. The case is so strong on liability, they claim, that "it is difficult to conceive how the defendants could possibly win." (Lurie Memorandum, filed September 26, 1975 at 8) Damages are asserted to range from 30 to 50 million dollars.

That both contentions are substantially exaggerated is evidenced not only by the persuasive submissions of the proponents of the compromise, but by the disparity between the actions and bargaining positions of the Luries' attorney, Robert Plotkin, prior to the time this settlement was agreed upon and his subsequent claims. Indeed all the arguments so energetically advanced are considerably dimmed by the shadow of the fact that at the time he was negotiating for a settlement, Plotkin was discussing a figure of $2 million as the basis for settlement of the Illinois class litigation. (Tr. 125; §2(d), and Ex. 3-J, Plotkin Affidavit, *supra*) Assuming the accuracy of his statements about the likelihood of success, the figure suggests a much lower estimate of possible damages; on the otherhand if his damage estimates are realistic, it suggests an evaluation of his chances of success considerably less sanguine than he now maintains. In fairness to Plotkin it does appear that this figure was always a tentative one. (Exs. 3-E, 3-J, Plotkin Affidavit, *supra*) Nevertheless the vastness of the difference between it and the figures he now claims to be the likely range of recovery is exceedingly striking. Indeed, the inference is inescapable that his present contentions are heavily colored by the threat that the prospect of approval of this settlement proposal poses to the viability of the Lurie litigation insofar as the Luries hope to represent a large class of investors.

In support of the somewhat extraordinary assertion

about the strength of their case the Luries have submitted almost nothing of probative value.[3] Annexed to the prehearing papers were copies of the complaints in their two cases, a proposed amended complaint in the federal action, the SEC's complaint in a related case, and their proposed order granting them partial summary judgment as to liability in their state case. These conclusory and argumentative documents shed no light whatsoever on the question before the court.

It is true that the attorney who appeared for the Luries at the hearing, Aram Hartunian, was prepared to make "copious" reference to the record in the state case in Illinois, particularly to the motion for partial summary judgment, in speaking to the strength of the claims in that proceeding. (Tr. 65-68) We declined to permit this. To have done so would have required this court to consider the merits and review the record in the current Illinois litigation and invited dispute with the other parties as to the differences and similarities between the two cases. Moreover, the failure to include even a scrap of substantive documentary material going to the strength of the case in their hefty pre-hearing submission, which would have been the appropriate manner to present the argument to this court, created the distinct impression that their offer of proof was more in the nature of a dilatory tactic than a good faith effort to aid the court in its determination. If Plotkin is correct that all material in his Illinois motion is applicable here, the proper course would have been to submit such material in an affidavit in opposition to this settlement.

The Luries again urged us to consider the summary judgment papers from the other case in the very substantial post-hearing material which was primarily directed at the question of damages. Although we recognize that there is authority in precedent, as well as common sense, for the proposition that it may be useful in assessing the strength

of a case for a court to examine the record in related proceedings, *State of West Virginia v. Chas. Pfizer & Co., supra*, 314 F. Supp. 710, 741 (S.D.N.Y. 1970), *aff'd* 440 F. 2d 1079 (1971), we continue to believe that it is not warranted in the present circumstances. First there is a signigicant, though perhaps not dispositive distinction between the kind of record available to Judge Wyatt in the *Pfizer* case and that being offered here. Judge Wyatt had the entire record in two cases, both of which had proceeded to the appellate stage. Such material is far more reliable as an objective source of information than such adversary documents as the briefs and exhibits in support of a motion for summary judgment, which much more often than not prove only that triable issues exist—a proposition which we do not doubt here. Second, we have most carefully studied the material which these objectors have submitted in support of the other half of their claim—that damages in this case are from 30 to 50 million dollars—and have concluded, as discussed below, that the figures are excessive in the extreme. The experience leads us to view with considerable skepticism the Luries' claim that another voluminous round of papers, copies of a motion which has now been pending in another court for 17 months with no disposition, will demonstrate that the case against these defendants is air tight. Finally, and perhaps most important, even if we grant the objectors the benefit of the doubt and assume that the case against these defendants is a good deal stronger than it appears from the submissions of the proponents (although we must discount as puffery their assertions of the inevitability of success), we find that the recoverable damages to the class are much closer to the $2.5 million figure asserted by the proponents to be the maximum recovery than the $30 to 50 million figure of the objectors.

As indicated above, the material submitted by the Luries in rebuttal of Dr. Murray's damages analysis and in

support of their own much larger figure is extensive. It includes the results of a computer study which purports to measure total losses to the class based on four alternative models of sotck holding period patterns, an affidavit by Dr. Andrew J. Senchack, Jr., Assistant Professor of Finance at the University of Texas, which critizes the methods and conclusion of Dr. Murray, and a very substantial post hearing memorandum. The thrust of all this is that damages to the class range from 30 to 50 million dollars and that a fair settlement would range from $71/2 to 10 million. The latter figure is derived by taking a "conservative" damage estimate of $30 to 40 million. cutting it in half on the "generous" assumption that this many class members won't file claims, and then granting a 50% recovery to the class based on Plotkin's long standing position that class members should ideally recover 50 cents on the dollar for their loss. (Post Hearing Memorandum, November 3, 1975, p. 35) The logic of these calculations is nowhere explained.

The fundamental defect of this approach is simply stated: The calculations are all designed to estimate *gross losses* to the class, that is the aggregate amount of money investors during the class period have lost, without regard to the causes of the loss. (Post Hearing Memorandum, *supra,* at 7-8). This, however, is an entirely distinct question from that of recoverable damages. It is elemental that a plaintiff can recover only that part of a given loss which is attributable to the defendant's wrongful conduct. See *Cutner v. Fried,* 373 F. Supp 4, 12 (S.D.N.Y. 1974) Application of this principle in market manipulation cases poses problems of extreme complexity, but this is no justification for dispensing with it altogether. Because their basic premise is in error, the Luries' computations, however accurate or interesting, are simply inapplicable to the question before us.

Although it is easy to point out the flaw in the figures

submitted by the Luries, it is exceedingly difficult to determine the amount of damages the plaintiff class would recover should they prevail at trial.

At the outset, the proper method of calculating damges in cases such as this is far from established. It is generally accepted that the theoretically preferred measure of damages in 10b-5 cases is the out-of-pocket rule applied in the common law tort action of deceit. *Harris v. American Investment Co.*, 523 F. 2d 220, 224-25 (8th Cir. 1975) and cases cited there. Cf. *Tucker v. Arthur Anderson & Co.*, 67 F.R.D. 468, 482 (S.D.N.Y. 1975). See generally, Note, Measure of Damages in Rule 10b-5 Cases Involving Actively Traded SEcurities, 26 Stan. L. Rev. 371, 383-85 (1974) (Hereinafter Note). By this rule a plaintiff's damage is determined as of the date of the purchase by subtracting the actual value of the security from the purchase price. Any attempt to ascertain the actual value of a publicly-traded security at a prior purchase date necessarily entails such a large element of speculation, however, that some courts have suggested fixing the actual value at the price of the security at some post-transaction date when full disclosure has been achieved. *Harris v. American Investment Co., supra,* 523 F. 2d at 226-27; *Tucker v. Arthur Anderson & Co., supra,* 67 F.R.D. at 482; and see Note, *supra,* 26 Stan. L. Rev. at 374-77 and 383-85. While this course has the obvious attraction of providing a concrete figure for the true worth of a security absent the fraud, it completely disregards the many other factors which influence price fluctuation over time of stocks in general or of a particular stock. It therefore has the potential of creating a windfall recovery to a plaintiff in the nature of indemnification against the risks of the viscisitudes of the market, and at the same time saddling defendants with payments far out of proportion to the damage caused by their fraud.

Where the suit is maintained as a class action the

complexities of calculating damages increase geometrically. In contrast to the case of a single plaintiff, whose dates of purchase and period of holding the stock are readily available, the entire class of purchasers over a period of years encompasses literally thousands of purchase and sale dates, many of which have significance in ascertaining damage. Many class members may actually have made money on the fraud, by buying at a relatively low price and selling out near the peak; many may have broken even. Moreover, where damages are computed on the basis of the value of the stock at some post-transaction date of full disclosure, there is no way to fairly account for those who sold at a loss prior to that date, since the only non-speculative causes of their loss are market and other factors wholly independent of the fraud.

The myriad obstacles to a fair computation of damages are well-illustrated by the facts of this case. There is nothing in the record from any of the interested parties purporting to provide a reasoned basis for determining the actual value of Javelin stock at any time prior to the dates of full disclosure mandated by the SEC.[5]

If the alternative method suggested in *Harris v. American Investment Co., supra,* is employed, the actual value would be determined as of the two dates on which trading resumed after full disclosure was achieved by SEC mandate, August 10, 1972 and January 27, 1975. See 5, 8, 10-11 and 14, *supra.* Any attempt to figure damages on this basis, however, would have to take account of the fact that the period encompassed by this action, April, 1969 to October, 1973, was perhaps the most disastrous period in the post-1929 history of the stock market. See *Cutner v. Fried, supra,* 373 F. Supp. at 12; *Feit v. Leasco,* 332 F. Supp. 544, 586 (E.D.N.Y. 1971). Furthermore, it would be necessary to consider seriously certain peculiarities of Javelin's situation which may well have accounted for a large decline in the price of its stock but might prove

demonstrably separable from the alleged fraud. For instance, it is during the first class period April 30, 1969 to May 31, 1972, that by far the largest amount of loss, calculated by the *Harris* method, occurred.[6] It was during this period, however, that the company was experiencing its well-publicized difficulties with the Newfoundland government over the linerboard project. See 7-8 and 10-11, *supra.* These facts suggest a strong probability that to whatever extent the drop in the price of Javelin stock from 21 1/2 in May 1969 to 7 1/8 in March 1972 exceeded the drop in the stock market generally for comparable securities, it was attributable to the uncertainty over the future of the linerboard project created to a large extend by the political dispute in which the company had become entangled rather than to the fraud of the defendants.[7] (See Letter to the Court of Benedict Wolf, June 14, 1976 at 4-5) Moreover, on August 10, 1972 the first day of trading after the full disclosure on May 31, the stock traded three points higher than when trading was suspended. This fact confounds the entire theory on which the *Harris* formulation is based.

We are convinced of the practical impossibility of ascertaining the "true value" of Javelin stock on any given date during the class period so as to compute damages according to the theoretically ideal damage formulation. We also believe that the proponents of the settlement are correct in asserting that the *Harris* alternative, whatever its value in other situations, is of no use in reaching a fair damage figure on the facts of this case, at least not without substantial modifications to account for the many other variables affecting the price movement of the stock.[8] Because we accept the proposition that other traditional damage formulations, such as loss of the bargain, and rescission, are entirely inapposite to cases such as this, see Note, *supra,* 26 Stan. L. Rev. at 374-77; 381-83, we are thus left to our own devices to fashion a fair damage approach.[9]

We conclude that for purposes of determining the fairness of this settlement, the analysis of Dr. Murray provides a creditable basis for arriving at an estimated range of potential recovery. Although not without its theoretical difficulties, the approach avoids most of the pitfalls of the methods discussed above and appears successfully to derive a damage figure which distinguishes that considerable part of Javelin's price fluctuations attributable to general market forces from that which could arguably be caused by the alleged misrepresentations. Even allowing for the possibility that his method overcompensates for these external factors, if the recoverable damages were, say, twice what he claims, we think the settlement is well within the range of reasonableness. Viewed another way, the only statement about recoverable damages which can be made with anything approaching confidence at this point is that the figure is somewhere between Dr. Murray's figure of $2.5 million and something less than the $12.8 million figure submitted by counsel for Javelin as partially adjusted *Harris* damages. See note 8, *supra*. Because we agree with proponents' counsel that even this figure fails to take account of significant factors which would further substantially reduce the recovery, see note 8, *supra*, we are prepared to believe that any ultimate figure derived from this formula would be significantly lower, and given the complexities and uncertainties which confront plaintiffs if this litigation is pursued, and the time and expense to all concerned which this would necessarily entail, we think that the settlement figure is a reasonable one.[10] Cf. *City of Detroit v. Grinnell Corp., supra*, 495 F. 2d at 455 and n. 2.

B. *The Other Objectors*

Apart from the Luries, eight class members—including two married couples—challenge the substantive fairness of the settlement on an assortment of grounds which can be dealt with rather briefly. Several mistakenly understood the

plan to exclude from participation any purchaser during the class period who failed to sell his shares. However, anyone who bought during the class period and suffered a loss is entitled to share in the fund and the loss of non-sellers is measured by the price of the stock on the first day of trading after full disclosure. Two of these objectors complained that the settlement did not provide for participation by those who bought Javelin stock prior to the class period and who continued to hold in reliance on the alleged misrepresentations. For better or worse, however, the federal securities laws preclude relief for holders in reliance and their exclusion from the class thus seems not only appropriate but mandatory. One objector expressed dissatisfaction with the possibility of being paid in warrants, but this is now moot in view of the company's decision to pay cash.

Two objectors opposed the provision allowing the defendants to choose among themselves who will put up what portion of the fund. They argue that this allows the two individual defendants, who control the company's decisions and who are assertedly personally responsible for the alleged wrongdoing, to escape accountability while saddling the company with payment. Indeed, it has been decided that the company will do just that. Such a provision, however, is a matter for the defendants to agree upon or not. If they are prepared to do so, and thus assure that an amount which is a fair settlement will be available to the class, then the interests of the class will be protected. Cf. *Percodari v. Riker-Maxson Corp.*, 50 F.R.D. 473, 477 (S.D.N.Y. 1970). (We note that if the decision of the company to pay the entire amount is the result of improper machinations by the individual defendants, the wrong is redressable by a shareholder's action. The impropriety of this decision is cast in serious doubt, however, by the fact that both the individual defendants are indemnified against liability for acts within the scope of their duties, an

indemnification which may well cover the wrongdoings alleged. (Tr. 29-30)

The remaining objections are more generally addressed to the fairness and adequacy of the settlement fund.

V.

Conclusion: The Settlement Should be Approved

The narrow question before us is whether this compromise is within the "zone of reasonableness" in view of what we know about the merits of the case, the potential recovery and the consequent risks and complexities of proceeding on through trial. See *Newman v. Stein, supra,* 464 F. 2d at 698. The plan appears to us to be within that zone. We credit the presentation of the proponents on the issue of liability, and although we believe there is a good possibility that a trier of fact might arrive at a higher figure of damages than Dr. Murray, we are confident that that figure would be significantly closer to his than to that of the Luries. Bearing in mind that "(t)he evaluation of a proposed settlement requires an amalgam of delicate balancing, gross approximations and rough justice," *City of Detroit v. Grinnell Corp., supra,* 495 F. 2d at 468, we find that this settlement merits approval.

Submit order.

Dated: New York, New York
June 30, 1976.

MORRIS E. LASKER
U.S.D.J.

FOOTNOTES

1. From the affidavit of Robert M. Kornreich, one of plaintiffs' attorney, it was apparent that the requirements of Rule 23 (a) and (b) (3) were met: the class of purchasers of Javelin stock numbered in the thousands, making joinder impracticable; virtually all the questions of law and fact, with the exception of calculation of damages, are common to the class and, thus, clearly predominate over individual issues; the claims of Bonime and Olden are typical of the class, as Bonime bought her shares in May, 1970 at a time when the company was actively engaged in the development of the linerboard project and Olden invested near the other end of the class spectrum, when the additional assertedly fraudulent activity regarding the Cerro Colorado project took place; the plaintiffs' attorneys are eminently well qualified, and experienced counsel in litigation of this nature; and the class action was superior to other available methods for adjudication of this controversy.

2. In fact, the Luries have opted out of this class, leaving their status as objectors somewhat open to question. Subsequent to the hearing counsel for Javelin filed a motion to strike their objection on this ground, but the issue is rendered academic by the fact that the third objector in this group, Sally Einstein, is a class member and clearly has standing to complain of the proposed compromise. (See Einstein Affidavit, November 21, 1975).

3. At the end of their post-hearing memorandum, the Luries provide a brief excerpt from Javelin's contract with the Panamanian government which tends to undermine the company's claim that its announcements regarding its right to exploit the Cerro Colorado copper were based on a good faith interpretation of the terms of the contract. (Post-Hearing Memorandum, November 3, 1975 at 38-40) It is, of course, impossible to assess the significance of this single

item, but even accepting it at face value, it is by no means inconsistent with the position of counsel for the plaintiff class which is that this is the strongest of the several allegations in the complaint. See *supra.*

4. We reject the assumption implicit in the Luries' approach, finally made explicit in the Post Hearing MEmorandum at page 8, note 1, that all (or gross) losses are recoverable damages in this case. The suggestion that this conclusion is compelled by the opinion in *Chasins v. Smith, Barney & Co.*, 438 F. 2d 1167 (2d Cir. 1970) is contradicted by the express distinction drawn there between the proper measure of damages where, as in that case, the issue was whether Chasins would have bought from the defendants at all if they had disclosed their interest in the stock, and a case such as this where the issue is whether the defendants manipulated the market and thereby secured an artificially high price for the stock. 438 F. 2d at 1173.

5. Dr. Murray expressly disclaimed use of his testimony or affidavit to ascertain the "true value" of Javelin stock. It is his view that the concept has relevance only to companies whose shares are not actively traded. (§§4.d and 7, Murray Affidavit, November 26, 1975) Dr. Senchack, the Luries' expert, also declined to calculate "true value," stating that the task would only be possible upon an exhaustive analysis of the company's business, its books and its personnel. (§§18-22, Senchack Affidavit, November 1, 1975) The Luries' attorney makes the statement that the "true value" rarely exceeded $3.00 per share during the class period, but offers nothing whatsoever to support that claim and, in fact, agrees that use of the usual out-of-pocket damage formula would "generally be unworkable" in cases such as this due to the difficulty of determining true value. (Note 1, Post-Hearing Memorandum, November 3, 1975 at pp. 8-9).

6. At the court's request counsel for the plaintiffs, for

Javelin and for the Luries submitted estimates of damages in this case calculated according to the *Harris* alternative. Their figures are quite similar. The Luries assert that *Harris* damages are $18 to $22 million for the first class period and $14 million for the second. Plaintiffs' counsel set the figures at $25,855,755 and $13,781,061 respectively, while counsel for Javelin estimate damages according to this formula at $27,578,507 and $13,785,776. (Laycock Affidavit, June 8, 1976; letters to the court of Benedict Wolf and George Mickum III, June 14 and June 11, 1976)

7. A major element of the alleged fraud in this period is the non-disclosure of the problems with the government, which in any event was, according to the uncontradicted statements of the proponents, largely public knowledge. This was only one reason why the plaintiffs' attorneys determined that the allegations focusing on the first class period were by far the weaker part of the case. See 8. 10-11, *supra.* Such considerations in addition to the general stock market decline during the class period, give serious cause to discount the significance of the very large damage figures produced by application of the *Harris* formula.

8. In connection with the submission of *Harris* damage figures referred to in note 6, counsel for the company submitted a modified estimate reflecting an attempt to factor out at least some of the variables, such as the effect of general market trends and the large number of short term buyers and sellers which must be discounted in arriving at a fair damage figure. Their adjusted estimates are $9,946,000 for the first class period and $2,937,000 for the second, or a total damage estimate of $12,883,000. (Letter of George Mickum, *supra,* June 11, 1976) We think that the modifications applied by the company's counsel to the raw *Harris* figures were appropriately made, and agree further that even the adjusted figure of $12,880,000 must be considered too large, as it takes no account of such factors as the very high turnover rate of Javelin stock, the

thousands of different holding period patterns of the class members and the resultant variety of overall profits and losses sustained, and, most importantly, of factors peculiar to the company but independent of the alleged fraud, such as the dispute with the government of Newfoundland. (See Mickum letter, supra, at 6-9)

In addition, in view of the assertion of plaintiffs' counsel that the chances of establishing liability as to the first class period are remote, see 8, *supra,* almost $10,000,000 of the figure must be considered highly speculative.

9. The extreme difficulty in reaching a fair damage figure were this case tried (and liability shown) is itself a factor which heavily commends settlement, *Newman v. Stein, supra,* 464 F. 2d at 693, as is the prospect of having to determine damages on an individual basis if it were ultimately concluded that class calculation is simply impossible. *City of Detroit v. Grinnell Corp., supra,* 495 F. 2d at 467.

10. We see no inherent incompatibility between accepting Dr. Murray's conclusion as a reasonable estimate of damages and proceeding to distribut the settlement fund according to a formula which measures loss in a manner akin to that employed by the court in *Harris v. American Investment Co., supra,* 523 F. 2d 220. See 14, *supra.* The former represents a sophisticated attempt to calculate damages with precision; the latter, a necessary rough accommodation to the practical realities of distributing the funds.

Appendix D—Stipulation Of Settlement Dated July 12, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GERTRUDE J. BONIME and LILLIAN OLDEN,
Plaintiffs,

-against-

JOHN C. DOYLE, WILLIAM M. WISMER, CANADIAN JAVELIN LIMITED,
Defendants.

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73 Civ. 5117 (MEL)

WHEREAS, plaintiffs commenced an action in this Court on their own behalf and on behalf of all other persons similarly situated who purchased common stock of Canadian Javelin Limited during the period commencing April 30, 1969, and ending October 24, 1973, in which action plaintiffs alleged that defendants violated Section 5 of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") Rule 10b-5 promulgated thereunder, and the common law, in that, inter alia, defendants are alleged to have disseminated false and misleading statements concerning the Linerboard Project undertaken by Canadian Javelin Limited in Newfoundland, Canada and related matters, which statements are alleged to have artificially inflated the market price of Canadian Javelin Limited common stock during the period from April 30, 1969 through May 31, 1972; that defendants are alleged to have disseminated

false and misleading statements concerning an amount claimed from the Government of the Province of Newfoundland and Labrador in connection with the purchase by that Government of the aforesaid Linerboard Project, and allegedly false and misleading statements concerning the Cerro Colorado Project in Panama and related matters during the period from June 1, 1972 through October 24, 1973, which statements are alleged to have artificially inflated the market price of Canadian Javelin Limited Common stock during the aforesaid period; and

WHEREAS, defendants have served and filed answers to the amended complaint, which answers deny the material allegations thereof, deny liability and demand dismissal of the amended complaint; and

WHEREAS, defendants continue to deny any wrongdoing whatsoever and consider that this action is without merit, but that it is nevertheless desirable and in the best interest of all concerned, including plaintiffs and the persons on whose behalf the action was instituted, that this litigation be terminated without further legal proceedings, thus avoiding the expense of such proceedings and the expenditure of time thereon by the defendants, including the officers and directors of Canadian Javelin Limited, and

WHEREAS, the attorneys for the plaintiffs have conducted a detailed investigation of the facts and the law relating to the matters set forth in the pleadings herein; have conducted extensive pretrial discovery proceedings, including oral depositions, and the analyses of thousands of pages of documents and records produced by the defendants and public records bearing on the issues herein and have conducted extensive negotiations with the attorneys for the defendants; and

WHEREAS, upon the basis of said investigation, pre-

trial discovery and negotiations, the attorneys for the plaintiffs have concluded that settlement of this litigation upon the terms and conditions specified in this Stipulation of Settlement is desirable, reasonable, fair and adequate and in the best interests of plaintiffs and the other members of the class whom they represent.

NOW, THEREFORE, IT IS STIPULATED AND AGREED, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, by and among the undersigned that this action and all individual and class claims which have been or might be asserted arising from or related to the matters alleged in the amended complaint shall be dismissed on the merits and with prejudice as to all parties, including all persons determined to be members of each plaintiff class herein who shall not have elected to be excluded from the class pursuant to Rule 23(c)(2), and shall be settled and compromised, subject to and conditioned upon the approval of the Court, in the manner and upon the terms and conditions set forth hereinafter:

1. As used herein, the following terms shall have the following meanings:

A. "Effective Date" means the date following the entry of a judgment approving this Stipulation as provided in paragraph 18 below when, by lapse of time or otherwise, such judgment shall no longer be subject to review or appeal.

B. "Class" means all persons who purchased Canadian Javelin Limited common stock during either the "First Class Period" or the "Second Class Period" and suffered loss thereby, and shall include the heirs, successors by operation of law and legal representatives of any such person; provided, however, that no person who was or is a director, officer or employee of Canadian Javelin Limited or any successor, assign, or member of the family of such person, or any trust of which such person or any

successor, assign or member of the family of such person was or is a trustor, trustee, or beneficiary, during any part of either of such periods shall be deemed to be a member of the class; and provided further that no person who had access to information not publicly available concerning the Linerboard Project referred to above, or the amount referred to above which was claimed by Canadian Javelin Limited from the Newfoundland Government, or the Cerro Colorado Project referred to above, shall be deemed to be a member of the class.

C. "First Period" means the period from April 30, 1969 through May 31, 1972, both dates inclusive.

D. "Second Period" means the period from June 1, 1972 through October 24, 1973, both dates inclusive.

E. "Entire Class Period" means the period from April 30, 1969 through October 24, 1973.

F. "Fund Distribution Date" shall be the 10th day (or if such day is not a business day, then the next succeeding business day) following the date when the validity of all proofs of claim shall have been determined (as provided in paragraphs 15-17 below), and no such determination shall any longer be subject to review or appeal.

G. "Person" includes, without limitation, any individual, corporation, partnership or other entity.

H. The date of purchase or sale of shares of Canadian Javelin common stock shall be the "Contract" or "Trade" date as distinguished from the "Settlement" date.

I. "Warrant" means one of the warrants which may be issued by Javelin pursuant to this Stipulation of Settlement, substantially in the form of Exhibit A hereto, which shall be in transferable form and entitle the holder thereof to purchase from Javelin at any time after the effective date hereof and prior to ten years from the effective date hereof, one half share of Javelin's authorized but

unissued common stock (which in the opinion of counsel for Javelin is fully paid and non-assessable, freely transferrable and free and clear of all claims, liens and encumbrances) at the market price of Javelin stock as hereinafter defined (see par. 1J).

J. "Market price of Javelin Stock" shall be the average of the closing prices of Javelin stock on the American Stock Exchange for 10 consecutive trading days commencing with 20 trading days before the date of the hearing referred to in paragraph 14C below.

2. Every purchaser of Canadian Javelin Limited common stock during either of the class periods, who suffered a loss as hereinafter determined, except any such purchaser who is a person specified in paragraph 1B above as excluded from the class, shall be entitled to share in the settlement fund established herein in the manner and to the extent provided below.

3. In full and final settlement and discharge of all claims arising out of or relating to the matters set forth in the amended complaint against any and all defendants, their predecessors, successors, assigns, officers and directors, and each of them, defendants shall pay the sum of $1,350,000 into a settlement fund ("Fund") as more fully set forth in paragraphs 4 and 5, below, in such proportions as they shall agree among themselves, to be distributed in accordance with this Stipulation and by Order of this Court.

4. The payment by defendant Canadian Javelin to the Fund shall be either in the form of Warrants or common stock, or in the form of cash or in some combination of Warrants common stock and cash, at the option of said defendant, such option to be exercised not later than the date which notice is given pursuant to paragraph 14B below provided however that if the value of the warrants or stock cannot be determined as provided herein Canadian

Javelin shall be required to make it payment then. In the event that any portion of the payment to the Fund shall be in the form of Warrants, Canadian Javelin will cause to be created Warrants to purchase shares of Canadian Javelin Limited common stock. Javelin will take the necessary steps to list the Warrants on the American Stock Exchange and if such listing is refused, to list the Warrants on the Montreal Stock Exchange. Defendant Canadian Javelin will use its best efforts to effect registration under the Securities Act of 1933 and listing on the American Stock Exchange of a sufficient number of common shares to be reserved for issuance upon exercise of the aforesaid Warrants. In the event that the aforesaid shares are not registered on or before August 31, 1977, each Warrant-holder shall have the right to convert each Warrant into one-quarter share of common stock. Said Warrants shall be in the form set forth in Exhibit A hereto. The value of each Warrant shall be determined as of a date 10 days prior to the date of the hearing referred to in paragraph 14C below, by an expert to be designated by plaintiffs' counsel.

5. The payments to the Fund by the individual defendants shall be in the form of cash.

6. Any Canadian Javelin shares to be issued by Canadian Javelin in accordance with this Settlement Stipulation are to be issued by it from shares which are at present authorized but unissued and shall in the opinion of counsel for Canadian Javelin be validly issued fully paid and non-assessable, freely transferable and free and clear of all claims, liens and encumbrances.

7. The claim of each class member who has sustained a loss shall be determined in the following manner. With respect to all shares purchased during the First Period, the claim shall be the different between the purchase price of the shares and the greater of (i) the selling price of the shares or (ii) the closing price of the stock on the American

Stock Exchange on the first day of trading after May 31, 1972. With respect to all shares purchased during the Second Period, the claim shall be the difference between the purchase price of the shares and the greater of (i) the selling price of the shares or (ii) the closing price of the stock on the first day trading was resumed on the American Stock Exchange after October 24, 1973. Any profit from a sale in the period from April 30, 1969, to and including the date of mailing of the notice of hearing hereinafter provided for, of Canadian Javelin common stock purchased during either the First or Second Class Periods, shall be deducted from losses in computing the claim of each class member.

8. If the total payable to all class members in the First Class Period whose proofs of claim are allowed exceeds one-third of the amount in the Fund, then the amount payable to each such class member in the First Class Period shall be reduced on a pro rata basis. If the total payable to all class members in the Second Class Period whose proofs of claim are allowed exceeds two-thirds of the amount in the Fund, then the amount payable to each such class member of the Second Class shall be reduced on a pro rata basis. If under the provisions of this Settlement Stipulation, a class member is entitled to receive a fraction of a Warrant to purchase Canadian Javelin common stock, cash shall be paid in lieu of any such fractional Warrant.

9. The Fund will be distributed under the Court's direction and supervision to members of the class whose proofs of claim are allowed. All expenses of administration in consummating the settlement and in notifying the class will be borne by Canadian Javelin. Plaintiffs' attorneys shall receive from the Fund such fee allowances and expenses as shall be awarded by the Court.

10. If, after distribution of the Fund in accordance with this Stipulation and the Order of this Court, there is any

balance remaining in the Fund, such balance shall be returned to Canadian Javelin.

11. If the proposed settlement is approved by the Court, Wolf Popper Ross Wolf & Jones, attorneys for plaintiffs, will apply for an allowance of legal fees in the sum of $260,000.00 plus an amount for reimbursement of expenses. Such fees and expenses as may be awarded by the Court shall be paid from the Fund within ten days after the Effective Date.

12. The following rules shall be applied in determination of the members of the Class and dollar amount of claims in distribution of the Fund:

A. Any person who acquired shares of Canadian Javelin common stock by gift, bequest, devise or by way of intestate succession may participate in the Fund if his predecessor in interest would have been qualified to do so and shall assume the purchase price and the date of purchase of his predecessor in interest for purposes of determining his entitlement to recover hereunder.

B. The cost of purchase of each Class member shall be the net price paid for the stock, exclusive of brokerage costs and any other expenses of purchase. The sales price of any of the stock sold shall be the net sales price, exclusive of brokerage expenses and any other expenses of sale.

C. On the Fund Distribution Date, there shall be paid to each Class member whose claim has been allowed, an amount computed in accordance with paragraphs 7 and 8.

13. If this Settlement Stipulation is not approved, then the Settlement Stipulation and any negotiations, statements and proceedings in connection therewith shall not in any event be construed as or deemed to be evidence or any admission or concession on the part of the defendants, or any of them, named in this action of any liability or wrongdoing whatsoever, which is hereby expressly

denied and disclaimed by each of the said defendants, and shall not be offered or received in evidence in any action or proceeding in any court or tribunal or used in any way as an admission, concession or evidence of any liability or wrongdoing of any nature on the part of any of the said defendants.

14. As soon as practicable after this Settlement Stipulation has been executed, the attorneys for the plaintiffs shall move for approval of this Settlement Stipulation and for the entry of the judgment referred to in Paragraph 18 hereof. As part of said motion, application shall be made for an order, consented to by all of the parties hereto:

A. Directing that this action may be maintained as a class action and that notice be given to members of the Class pursuant to Rule 23(c)(2) of the Federal Rules of Civil Procedure, in such manner and form as shall be directed by the Court;

B. Directing that notice of the hearing referred to in (C) below be given not later than 60 days after issuance of the order to members of the Class and to all present stockholders of Canadian Javelin pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, in such manner and form as shall be approved by the Court;

C. Directing that a hearing be held by the Court on such day and time as may be designated by the Court for the purposes of determining whether this Settlement Stipulation is fair, reasonable and adequate and should be approved and a judgment entered as provided in Paragraph 19 hereof;

D. Providing that any stockholder or member of the Class who objects to approval of this Stipulation or the judgment to be entered hereon may if said Class member does not exclude himself pursuant to sub-paragraph "F"

below, appear at the hearing and show cause why the settlement proposed herein shall not be approved as fair, reasonable and adequate and why a judgment should not be entered hereon. Unless the Court otherwise directs, any stockholder or class member who wishes to appear at the hearing for the purpose of objecting to the settlement proposal herein shall submit a written objection to approval of the settlement, such written objection and any memorandum in support thereof shall be filed with the Court at least days prior to the hearing set by the order and copies thereof shall be mailed on or before filing with the Court to Wolf Popper Ross Wolf & Jones, 845 Third Avenue, New York, New York 10022, attorneys for the plaintiffs; Diamond & Golomb, 99 Park Avenue, New York, New York 10016, attorneys for Canadian Javelin; and Moses Krislov, 800 Engineers Building, Cleveland, Ohio 33114, attorneys for defendants John C. Doyle and William M. Wismer. Proof of service upon the aforesaid attorneys shall also be filed with this Court;

E. Providing that, unless the Court otherwise directs, no stockholder or member of the Class shall be entitled in any way to contest the approval of the terms and conditions of this Stipulation or the judgment to be entered herein except by serving and filing written objection in accordance with subparagraph "D" above and that any stockholder or member of the Class who fails to object in the manner prescribed shall be deemed to have waived and shall be foreclosed forever from raising such objections;

F. Requiring, pursuant to Rule 23(c)(2) of the Federal Rules of Civil Procedure, that any member of the Class who desires to be excluded from the Class request exclusion in writing by filing a request for exclusion with the Court by a date designated in the order, which will not be later than 10 days before the hearing and any member of the Class who has so excluded himself shall not be entitled to participate in the Fund;

G. Requiring that any member of the Class desiring to participate in the Fund file with the Clerk of the Court or such person as the Court may designate a verified Proof of Claim in the form annexed hereto as Exhibit "B" no later than 90 days after the hearing referred to in paragraph 14C above;

H. Providing that the notice required under subparagraphs A and B hereof be given: (i) by mailing a copy of such notice within 60 days after the entry of the order requiring such notice to all stockholders of Canadian Javelin as shown by the stock records of Canadian Javelin at the address set forth on such records as of 30 days prior to the entry of the order (in the case of shares registered in street name, Canadian Javelin shall supply brokerage firms with sufficient copies to mail to all beneficial owners and Canadian Javelin shall reimburse brokerage firms for postage expenses for mailings to beneficial owners), to all members of the class who are no longer stockholders of Canadian Javelin and whose names and addresses can be ascertained by reasonable diligence either through the records of Canadian Javelin or the records of the Canada Permanent Trust Company, the transfer agent for Canadian Javelin stock, at the address on such records, and (ii) by publication once in the New York Times, all national editions of the Wall Street Journal and the Toronto Globe & Mail.

J. Providing that the notice specified in subparagraph H hereof shall constitute due and sufficient notice of the hearing to all persons entitled to receive such notice, and requiring that proof of mailing and publication be filed at or prior to the hearing.

15. The following conditions shall apply to the filing of each Proof of Claim:

A. The Proof of Claim shall be executed under oath, in the form annexed hereto as Exhibit "B" and shall be

accompanied by brokers' confirmations or monthly account statements relating to all purchases of Canadian Javelin common stock prior to and during the class period and sales of Canadian Javelin common stock during and subsequent to the class periods if such confirmations or account statements are in the possession or under the control of the claimant;

B. By filing a proof of claim, each Class member will thereby submit himself to the jurisdiction of the Court. Each proof of claim shall be subject to investigation and discovery pursuant to the Federal Rules of Civil Procedure and upon acceptance of said proof of claim and upon receipt by each Class member of his distributive share of the Fund each Class member thereby releases the defendants, their predecessors, successors, heirs, assigns, officers, directors, partners, and former partners, employees and attorneys and each of them of all claims and demands arising from or relating to the matters alleged in the amended complaint, or arising from or relating to the consummation of the terms of this Stipulation;

C. All proofs of claim will be subject to review by Wolf Popper Ross Wolf & Jones; Diamond & Golomb, P.C.; Steptoe & Johnson; and Moses Krislov. A proof of claim will be deemed accepted unless rejected by any of said attorneys no later than 20 days after the last day for the filing of proofs of claim;

D. If any proof of claim is rejected, in whole or in part, Notice of Rejection thereof shall be given to the person filing said proof of claim no later than 20 days after the last day for filing of proofs of claim, advising said claimant of the reason for such rejection and of the right to a hearing thereon. Within 30 days after the date of mailing of such Notice of Rejection, the Class member may file with the Court a written request for a hearing, and a copy of such request shall be mailed to Wolf Popper Ross Wolf &

Jones; Diamond & Golomb, P.C., and Moses Krislov, on or before the date it is filed with the Court. In the event that no such request for hearing is received within said 30 day period, the Class member shall be deemed to have consented to rejection of his proof of claim. Notice of all hearings upon any claim relating to participation in the Fund shall be given by the Court to counsel for all parties;

E. In the event that (i) a member of the Class prevails at the hearing with respect to his rejected proof of claim, in whole or in part, and the Court's decision is no longer subject to review or appeal, or (ii) such Class member prevails on appeal, the amount awarded to the Class member shall be paid to him.

16. The administration of the settlement and the decision of all controversies relating thereto, including disputed questions of law and fact relating to the validity of claims and the manner of proving claims, shall be under the authority of the Court and may, subject to the Court's discretion, be submitted in whole or in part to a Master.

17. Any Class member who fails to make a timely filing of an adequate Proof of Claim shall be forever barred from participating in the distribution of the Fund, but shall in all other respects be subject to the provisions of this Stipulation. Each proof of claim shall be deemed to have been filed when posted, if mailed by registered or certified mail, postage prepaid, addressed in accordance with the instructions given therein. A proof of claim filed otherwise shall be deemed to be filed at the time it is actually received by the Clerk of the Court or such other person as may be designated by the Court to receive same.

18. Upon the approval by the Court of this Settlement Stipulation, including any amendments hereto, a judgment shall be entered in the appropriate form: (a) approving the Settlement Stipulation, and adjudging the terms thereof to be fair, reasonable and adequate, and directing con-

summation of its terms and provisions and retaining jurisdiction to effectuate the same and to deal with the failure of any of the party signatories to comply with the terms, provisions and obligations flowing therefrom; (b) awarding fees and reimbursement of expenses to attorneys for plaintiffs (including fees of accountants or experts) or retaining jurisdiction for such purposes; (c) dismissing this action on the merits and with prejudice as against the plaintiffs, the Class, and all defendants, and without costs; (d) permanently barring and enjoining the institution or prosecution by any Class member either directly or representatively of any other action asserting claims which have been or might be asserted arising from or relating to the matters alleged in the amended complaint; (e) reserving jurisdiction over all matters relating to the administration and effectuation of the settlement and compromise provided for herein, including the distribution of the Fund and (f) containing such other and further provisions consistent with the terms and conditions of this Settlement Stipulation as the Court may deem advisable.

19. In the event that the Court does not approve this Settlement Stipulation and its failure to approve becomes final by reason of its affirmance on appeal or by lapse of time or otherwise, or in the event the Court approves the Settlement Stipulation but such judgment of approval is finally reversed on appeal, this Stipulation and the Order to be entered pursuant to paragraph 19 hereof shall be of no further force or effect without further act by any party to this Settlement Stipulation, and no hearings or proceedings taken thereunder, including the decision thereon, and no fact referred to in such hearings or proceedings shall be considered or used as evidence or for any other purpose in this or any other proceeding.

20. This Stipulation may be executed in two or more counterparts.

Dated: New York, New York
July 9th, 1975

WOLF POPPER ROSS WOLF & JONES
Attorneys for Plaintiffs
By s/

DIAMOND & GOLOMB, P.C. and
STEPTOE & JOHNSON
Attorneys for Defendant Canadian
Javelin Limited
By s/

MOSES KRISLOV and
MARTIN OZER
Attorneys for Defendants John
Doyle and William M. Wismer
By s/ Moses Ozer

APPENDIX "E"
NOTICE OF CLASS CERTIFICATION AND PROPOSED SETTLEMENT

TO: All persons who purchased common stock of Canadian Javelin Limited between April 30, 1969 and October 25, 1973, inclusive.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GERTRUDE J. BONIME and LILLIAN OLDEN,

Plaintiffs,

-against-

JOHN C. DOYLE, WILLIAM M. WISMER and CANADIAN JAVELIN LIMITED,

Defendants.

THIS NOTICE IS GIVEN PURSUANT TO RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND AN ORDER OF THE ABOVE-NAMED COURT FILED JULY 9, 1975

1. THE NATURE OF THE ACTION

The above-entitled action was commenced on December 3, 1973, by plaintiff Bonime, and on December 11, 1974 plaintiff Olden was added as a party plaintiff. The action was prosecuted on behalf of plaintiffs and all other

persons similarly situated who bought Canadian Javelin Limited ("Javelin") stock during the period from April 30, 1969 through October 25, 1973, inclusive.

The amended complaint ("Complaint") charged that defendant Javelin and the individual defendants, two of its principal officers, took certain actions in violation of the federal securities laws with the object of inflating the price of Canadian Javelin stock during the period commencing early in 1969 and continuing through October, 1973.

The Complaint charged that Javelin issued various releases and financial statements concerning Javelin's activities in connection with its project to manufacture linerboard in the Province of Newfoundland, Canada (the "Linerboard Project") and a project to exploit mineral resources in the Republic of Panama, which releases and financial statements allegedly contained untrue statements of fact and omitted material facts.

Specifically with regard to the Linerboard Project, the Complaint alleged that Javelin made statements that production would start in 1971 and that the mill would be the largest and most up-to-date in the world, but Javelin allegedly did not truly reveal the size, the anticipated profitability and commercial feasibility of the project, the production quality or quantity, the cost of the project as compared to cost projections, the financing needed for the project, the extent of the financial support from the Newfoundland government, certain serious disputes with that government concerning the project, and difficulties it was having in obtaining financing.

In or about May, 1972 the Newfoundland government agreed to purchase the Linerboard Project from Javelin. The Complaint went on to allege that Javelin reported in April, 1973 a current asset of $4.3 million dollars as due from that government, but failed to reveal that the government had not acknowledged this claim, nor had Javelin taken the necessary steps to establish this claim.

The Complaint alleged further that the defendants gave the public, by press releases and reports, the false and misleading impression that Javelin had the right to exploit a large copper discovery in Panama, that it had made commercial feasibility studies concerning the copper project, that it had made financial arrangements to begin mining and production, and that it had a favorable arrangement to sell the entire initial output of this project. It is alleged that Javelin failed to disclose publicly that its right to exploit the ore was highly speculative, that neither a final commercial feasibility study nor financial arrangements for mining and production existed and that Javelin was still negotiating for the sale of all or part of the output of the project.

As a result of all these statements and omissions, according to the Complaint, the defendants artificially inflated Javelin's common stock during the 1969-1973 period, and the purchasers of Javelin stock in that period, if they had known the facts about Javelin, would not have bought the stock at the prices they paid which it is alleged were above the fair market value of the stock. The plaintiffs claimed that they and all others similarly situated were damaged because of the wrongful acts set forth in the Complaint which violated the securities laws and the common law, and they asked for judgment against the defendants, for themselves and all other persons similarly situated, in the amount of damages they sustained.

FURTHER PROCEEDINGS

The defendants appeared and filed their answers, in which they denied all charges of wrongdoing which plaintiffs had made in the Complaint, and specifically denied that any releases or reports issued or filed by Javelin were false or misleading.

On February 10, 1975, the Court issued an order

allowing this action to be maintained as a class action pursuant to the provisions of Rule 23(c)(1) of the Federal Rules of Civil Procedure, on behalf of all purchasers of Javelin's common stock during the period April 30, 1969 through October 25, 1973, other than the defendants.

Meanwhile, plaintiff's attorneys had been conducting extensive pre-trial discovery proceedings, including the examination of numerous documents, securing answers to written interrogatories, and examining witnesses under oath.

On July 9, 1975 to avoid further litigation and expense, the defendants agreed to settle this case as a class action, subject to the approval of the Court and notice to the class. Plaintiffs, for their part, accepted and approved the proposed settlement, recognizing, *inter alia*, that the complexity of the issues, involving as they do, relations between Javelin and the Newfoundland Government and between Javelin and the Republic of Panama, would protract and add to the expense of further prosecution, and that the eventual outcome of trial and appeal of this strongly contested litigation is uncertain.

THE CLASS

The settlement agreement establishes as the class covered by it all persons who bought the common stock of Javelin during the period from April 30, 1969 through May 31, 1972 (First Class Period) or during the period from June 1, 1972 through October 24, 1973 (Second Class Period), and their heirs, successors by operation of law and their legal representatives, but excluding any person who was a director, officer or employee of Javelin at any time during the period from April 30, 1969 through October 24, 1973 and their successors or assigns and their family members or any trust in which they are trustor, trustee or beneficiary, or any person who had access to information

not publicly available concerning the Linerboard Project, the amount which was claimed by Javelin from the Newfoundland government or the project to exploit mineral resources in Panama, as well as any person who requests exclusion from the class in accordance with the procedures of Rule 23 of the Federal Rules of Civil Procedure.

THE SETTLEMENT

The terms of the settlement are set forth in the Stipulation of Settlement dated July 9, 1975, between the plaintiffs and the defendants. The following is a brief summary of its terms.

The defendants agree to pay into a settlement fund (the "Fund") the sum of $1,350,000.00. They will agree among themselves what portion of this sum each will pay. The payment of Javelin will be announced prior to the issuance of this notice to the members of the class, and will be at its option either in cash, stock or warrants or a combination of cash, stock and/or warrants.

The warrants are to be ten-year warrants each entitling the holder to purchase one-half share of Javelin stock at the market price (as defined in the Stipulation), this market price to be the average of the closing prices of Javelin stock on the American Stock Exchange during a fixed period prior to the date of the settlement hearing referred to below. Javelin is to take the necessary steps to get the warrants listed on the American Stock Exchange or, in the event such listing is rejected, on the Montreal Stock Exchange, and to get the underlying stock registered. If the stock is not registered within a fixed period of time, each four warrants will be convertible into a share of Javelin common stock. The value of each warrant will be determined by an expert to be designated by plaintiffs' attorneys.

Every class member who has sustained a loss from the

sale of Javelin stock purchased during the period from April 30, 1969 through October 24, 1973, in excess of profits made on the sale of Javelin stock purchased during the said period will be entitled to a proportionate share of the Fund on the filing of proper Proofs of Claim. One third of the Fund will be allocated to those who purchased stock in the First Class Period and two thirds to those who purchased in the Second Class Period.

HEARING ON APPROVAL OF THE SETTLEMENT

YOU ARE HEREBY NOTIFIED that a Hearing will be held on October 17th, 1975 at 9:30 A.M., before Honorable Morris E. Lasker, Judge of the United States District Court for the Southern District of New York, in Room No. 618, United States Courthouse, Foley Square, New York, N.Y., pursuant to an Order of this Court dated July 9, 1975 to determine whether the proposed settlement of the above-entitled class action litigation should be approved by the Court as fair, reasonable and adequate and whether said action should be dismissed on the merits and with prejudice as to the defendants.

If you are a member of the Class described above, your rights will be affected by these proceedings. At the Hearing any member of the Class may appear and show cause, if any he has, why the proposed settlement should not be approved as fair, reasonable and adequate and why this litigation should not be dismissed on the merits with prejudice, provided that no such person shall be heard and no papers or briefs shall be submitted to the Court, except by special permission of the Court, unless on or before September 29th, 1975, notice of intention to appear and a statement of the basis for objections, together with a memorandum of supportive authorities, are filed with the Court and mailed first class no later than September 26th

1975, to Wolf Popper Ross Wolf & Jones, Esqs., 845 Third Avenue, New York, New York 10022, attorneys for the plaintiffs; Diamond & Golomb, P.C., 99 Fark Avenue, New York, New York 10016, attorneys for defendant Canadian Javelin Limited, and Moses Krislov, Esq., 800 Engineers Building, Cleveland, Ohio 33114, attorney for the individual defendants.

PARTICIPATION IN THE FUND AND REQUIREMENTS OF FILING A PROOF OF CLAIM

Javelin has exercised its option as to the form of its payment into the Fund, by agreeing that it and the individual defendants will pay the total amount of settlement, $1,350,000, in cash.

In order to receive the proportionate share of the Fund to which you may be entitled, you are required to complete and file no later than January 16, 1976, a Proof of Claim on the form approved by the Court, set forth below, together with broker's confirmations or monthly accounts relative to all purchases of Javelin common stock during the class periods and sales of such Javelin common stock,,if such documents are in your possession or under your control. Any class member who does not timely file the Proof of Claim will not be permitted to share in the settlement.

Upon acceptance of your Proof of Claim and receipt of your distributive share of the Fund, you will thereby release the defendants, their predecessors, successors, heirs, assigns, officers, directors, partners, former partners, employees and attorneys of all claims and demands arising from or relating to the matters alleged in the amended complaint, or arising from or relating to the consummation of the terms of the Stipulation of Settlement. **If you are a member of the Class and neither exclude yourself from the class in the manner provided below nor file a timely and**

proper Proof of Claim you will be forever barred from any recovery from the defendant with respect to the claims which are or which could have been asserted in this litigation.

The Stipulation of Settlement sets forth the method of review of Proofs of Claim, with final determination, in the event of rejection of claim, to be made by the Court or by a Master appointed by the Court.

REQUEST FOR EXCLUSION

If you desire to be excluded from the class and the settlement, you must write to:

Clerk
United States District Court
U.S. Courthouse
Foley Square
New York, New York 10007

setting forth your name and address, the number of shares you purchased in the period from April 30, 1969 through October 24, 1973, the dates of such purchases and the prices paid, the number of shares you sold during said period, the dates of such sales and the prices received, and your request to be excluded. Your request for exclusion must be received on or before October 7th, 1975. Any Class member who elects to be excluded from the Class and the settlement remains free to pursue, at such Class member's own cost, whatever legal rights such Class member may have.

If you do not elect to be excluded, you may enter an appearance through your own counsel if you desire, and participate in the settlement through such counsel. If you do not request exclusion, and do not enter an appearance through your own counsel your interests in the litigation

will be represented by the attorneys for the plaintiffs and the Class, Wolf Popper Ross Wolf & Jones.

ATTORNEYS' FEES, COSTS

If the settlement is approved, the attorneys for plaintiffs will apply for reimbursement of their out-of-pocket expenses and for $260,000 as fees. The Court will determine the amount of fees to be allowed. Payment of fees and expenses will be made from the Fund. All expenses of administration in consummating the settlement will be borne by Javelin.

OTHER LITIGATION

After this action was commenced, two stockholders started an action in the Federal District Court in Chicago (**Faye Lurie, et ano. v. Canadian Javelin Limited, et al.,** 73 C 3086) based generally on the same issues as are involved in this action, which case has remained dormant, and another action in the Circuit Court of Cook County, Illinois (**Faye Lurie, et ano. v. Canadian Javelin Limited, et al.,** 73 CH 7442) also based generally on the same issues as are involved in this case. In the latter action plaintiffs moved for a class action determination under Illinois Rules and for partial summary judgment and defendants cross-moved for complete summary judgment. The class action motion has been pending since July 12, 1974 and plaintiffs' partial summary judgment motion has been pending since December 17, 1974, both without determination.

EXAMINATION OF PAPERS

The foregoing references to the pleadings, the settlement agreement and other documents are only summaries thereof. For a complete and detailed description of all the terms, conditions and provisions of the settlement agreement, the form of the warrant to be issued, the pleadings and other pertinent papers, reference is made to the underlying documents, the complete texts of which are on file with the Clerk of the United States District Court for the Southern District of New York Foley Square, New York, New York under the file number set forth above, where they are available for inspection and copying during regular Court business days.

BY ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Dated: New York, N.Y.
July 9, 1975

s/ MORRIS E. LASKER
MORRIS E. LASKER
Judge

APPENDIX F

FORM FOR VERIFIED PROOF OF CLAIM AND RELEASE

Pursuant to court order, in order to receive any payments in the below litigation, you must file this Proof of Claim on or before January 16, 1976. If you fail to file by that date, your claim will be subject to rejection and you may be precluded from receiving any money in the settlement of this class action.

Mail your claim promptly to:

Clerk of the United States District Court, Southern District of New York
(Re: Bonime v. Doyle, et al, 73 Civ. 5117 (MEL)
United States Courthouse
Foley Square
New York, New York 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GERTRUDE J. BONIME and
LILLIAN OLDEN,

Plaintiffs,

—against—

JOHN C. DOYLE, WILLIAM M. WISMER,
and CANADIAN JAVELIN LIMITED,

Defendants

---

being duly sworn, deposes and says:

I. IDENTITY OF CLAIMANT: (Fill in appropriate space in only one of the following paragraphs, either A, B, C, D, or E).

A. INDIVIDUAL OR JOINT OWNERSHIP:
My (our) name(s) is (are)

and my (our) address is

B. CORPORATION:

I am the of

NAME OF CORPORATION

I am authorized to make this claim on behalf of the corporation.

C. PARTNERSHIP:

I am a member of
a co-partnership; our business address is .

I am authorized to make this claim on behalf of the partnership.

D EXECUTORS OR ADMINISTRATORS:

I am (we are)

the executor(s) administrator(s) of the Estate of

, deceased, and my (our) mailing address is

E. OTHERS:

(Give full particulars: name, address, on whose behalf you are acting, capacity etc.).

Insert page 3

I am enclosing to the extent available the original or facsimile of the broker's confirmations, monthly accounts or other documents evidencing my status and in support of my claim. (If any such documents are not in your possession, please indicate below the name and address where such documents can be obtained).

III. SUBMISSION TO JURISDICTION OF COURT AND RELEASE OF DEFENDANTS

Claimant submits this Proof of Claim under the terms of the Stipulation of Settlement dated July 9, 1975, and claimant submits to the jurisdiction of the United States District Court for the Southern District of New York with respect to his claim and agrees to be bound by and subject to ther terms of any judgment that shall be entered upon the Stipulation of Settlement. Claimant understands that the information contained in this Proof of Claim may be subject to further investigation and discovery under the Federal Rules of Civil Procedure and claimant agrees to furnish additional information to support this claim if required to do so.

In consideration of participating in the settlement claimant does by these presents for himself, his heirs, executors, administrators, successors and assigns, remise. release and forever discharge defendant Canadian Javelin Limited and its past and present officers, directors, employees, agents, attorneys, subsidiaries and affiliates and defendants John C. Doyle and William M. Wismer, and their heirs, representatives, agents, attorneys and successors, from all claims which have been asserted in the action, and all claims and causes of action which might have been asserted in connection with, or which arise out of, any of thr matters alleged in the action, whether known or unknown.

Signed by

STATE OF
COUNTY OF

On this day of , 1975, before me personally appeared

known to me to be the person who executed the within instrument and subscribed to and swore to the truth of said instrument before me and acknowledged to me that (s)he executed the same.

NOTARY PUBLIC

APPENDIX G

CONSENT ORDER AND FINAL JUDGMENT

ENTERED AUGUST 9, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GERTRUDE J. BONIME and
LILLIAN OLDEN,

Plaintiffs,

-against-

JOHN C. DOYLE, WILLIAM M. WISMER
and CANADIAN JAVELIN LIMITED,

Defendants.

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73 Civ. 5117 (MEL)

The parties having submitted to the Court a Stipulation of Settlement dated July 9, 1975 ("Settlement Stiuplation") providing for the settlement of this action and for the dismissal of the claims asserted or which could have been asserted therein upon the terms and conditions set forth in said Settlement Stipulation, and this Court, by Orders filed on February 10, 1975 and on July 9, 1975, having determined that this action may be maintained as a class action on behalf of all persons who purchased Canadian Javelin Limited common stock during the period commencing April 30, 1969 through October 25, 1973, inclusive, and,

further by said Order filed on July 9, 1975, having directed, among other things, (i) that a hearing be held on October 17, 1975 at 9:30 a.m. in Room 618 of the U.S. Courthouse, Foley Square, New York, New York 10007 for the purpose of determining whether the Settlement set forth in the Settlement Stipulation is fair, reasonable and adequate and should be approved by the Court and whether the action should be dismissed on the merits with prejudice and without costs; (ii) that a notice of the class action determination, of the settlement hearing, of the right of class members to request exclusion from the class and the settlement and not be bound by the settlement, judgment or other disposition of the action, and of the requirements of filing of proofs of claim be given by Canadian Javelin Limited within sixty (60) days after the date of said Order by first class mail addressed to holders of record of the common stock of Canadian Javelin Limited as shown on the stock transfer records as of thirty (30) days prior to entry of said Order and to all other identifiable members of the class who are no longer stockholders of Canadian Javelin Limited, and by publication once in The New York Times and all national editions of The Wall Street Journal and The Toronto Globe and Mail; (iii) that any member of the class of Canadian Javelin Limited stockholders might appear at the hearing and present evidence and show cause, if any he had, why the proposed settlement should not be approved as fair, reasonable and adequate and the action dismissed on the merits, with prejudice and without costs, provided that no such person should be heard, except by special permission of the Court, unless an objection had been in writing and provided further that no objections, papers and briefs should be received and considered unless filed with the Court no later than twenty (20) days prior to the hearing date and mailed three (3) days before such filing to Messrs. Wolf Popper Ross Wolf & Jones, Diamond & Golomb, P.C. and Moses Krislov,

Esq.; and (iv) that any members of the class desiring to be excluded from the class should file a request for exclusion not less than ten (10) days prior to the hearing; and

Due proof of giving of such notice in accordance with said Order having been submitted to the Court and the Court having read the affidavits, letters and papers submitted and filed in support of and against the fairness, reasonableness and adequacy of the settlement as set forth in the Settlement Stipulation; and

All persons present at the hearing having been given an opportunity to be heard in support of the settlement or in opposition thereto, and the Court having fully considered the Settlement Stipulation, the testimony of Doctor Roger F. Murray and all affidavits, letters and papers submitted to it in support of or in opposition to said settlement,

NOW, THEREFORE, upon the record and all prior proceedings herein, and after due deliberation the Court having rendered its Memorandum dated June 30, 1976, it is

ORDERED AND ADJUDGED THAT:

1. Due and adequate notice of the class action determination, the proposed settlement, and the hearing, and full opportunity to be heard have been given.

2. The Settlement Stipulation is hereby approved and is adjudged to be fair, adequate and reasonable.

3. The defendants are adjudged to be jointly and severally liable to pay $1,350,000 into a settlement fund (the "Fund") as required by said Settlement Stipulation.

4. Canadian Javelin Limited shall deposit with Diamond & Golomb, P.C. or Steptoe & Johnson, Esqs. as escrowee(s), the following amounts on or before the dates hereinbelow indicated:

November 5, - $175,000.00
February 7, 1977 - $225,000.00
May 5, 1977 - $150,000.00
August 5, 1977 - $400,000.00
November 7, 1977 - $400,000.00

The said amounts are to be deposited out of royalties (*i.e.*, quarterly payments to become due to Canadian Javelin Limited from Wabush Mines Consortium on iron ore tonnage shipped or produced from the demised premises at Wabush, Labrador) to be received by Canadian Javelin Limited after the date of this Order and Final Judgment. Said amount or amounts so deposited shall become part of the Fund and shall be immediately placed into an interest bearing escrow account for the benefit of the members of the class entitled to share in the Fund.

5. Notwithstanding the provisions of paragraph 4 hereinabove, the cash amount of $1,350,000 or, if sums have been deposited pursuant to the provisions of said paragraph 4, the cash difference between such sums theretofore deposited into escrow (excluding interest) and the sum of $1,350,000 (which difference is hereinafter referred to as the "balance due") shall be immediately deposited by Canadian Javelin Limited with Diamond & Golomb, P.C. or Steptoe & Johnson, Esqs., as escrowee(s) if after the date of this Order and Final Judgment and any time before the time specified in paragraph 6(a) or 6(b) hereinbelow (whichever is later), Canadian Javelin Limited shall obtain sufficient financing from a lending institution, settle its claims against the Newfoundland Government in an amount sufficient to make such deposit or shall otherwise obtain sufficient additional funds which can be applied to make such deposit.

6. Notwithstanding the provisions of paragraphs 4 and 5 hereinabove, within ten(10) days after (a) the expiration of time to appeal from this Order and Final Judgment or (b) if an appeal be had, affirmance on appeal and expiration of time for further review or appeal, defendants shall deposit with the escrow agent Diamond & Golomb, P.C. or Steptoe & Johnson, Esqs., the cash sum of $1,350,000 or, if sums have been deposited pursuant to the provisions in paragraph 4 hereinabove, the balance due. The said sum or

balance due shall be placed into an interest bearing escrow account for the benefit of the members of the class entitled to share in the Fund. Upon application made within ten (10) days prior to the date said sum or balance due is to be deposited into escrow, and upon good cause shown by defendants, after notice to plaintiffs, the Court may consider whether there shall be any extension of time within which payment of said sum or balance due pursuant to this paragraph shall be made and shall retain jurisdiction to make such modification (if any) as to time of payment, and to impose such conditions thereon (including payment of interest) as the Court shall deem proper.

7. On the "Fund Distribution date" provided in said Settlement Stipulation, the escrow agent shall deliver the amount of the Fund including any interest which accrued thereon, to Wolf Popper Ross Wolf & Jones for distribution by Wolf Popper Ross Wolf & Jones in the manner provided in the Settlement Stiuplation after deduction of the amount which may be awarded to them by the Court for counsel fees and disbursements. All expenses of administration, including expenses of distribution incurred by Wolf Popper Ross Wolf & Jones shall be paid to Wolf Popper Ross Wolf & Jones by defendants on the,"Fund Distribution Date".

8. This action shall be dismissed on the merits, with prejudice and without costs as to the defendants.

9. The Settlement Stiuplation shall be consummated in accordance with its terms and provisions, and this Court may make such Orders as may be necessary or appropriate in connection therewith including, but not limited to, orders concerning the method of determining objections to proofs of claim, the method of distributing the Fund, and the adjudication of the validity of claims of class members which have been objected to by the parties and as to which hearings were requested.

10. All persons who are members of the class and who

have not opted out in accordance with the procedures set forth in the notice of a class action determination referred to above or who have not otherwise been permitted by the Court to opt out (including persons who have filed claims which were rejected by the parties and who did not timely request a hearing thereon, and those who filed claims and requested such hearing) are permanently barred and enjoined from instituting or prosecuting either directly or representatively any action asserting claims which have been or might be asserted arising from or relating to the matters alleged in the Amended Complaint.

11. This Court shall retain jurisdiction over all matters relating to the administration and effectuation of the settlement as provided in the Settlement Stiuplation, including the proper distribution of the Fund, and the allowance to plaintiffs' attorneys or reasonable counsel fees and disbursements incurred in connection with this action.

12. This Order and Judgment shall constitute a final decision of this Court for the purpose of 28 U.S.C. § 1291.

Morris E. Lasker
U.S.D.J.

Dated: New York, New York
July 30, 1976

JUDGMENT ENTERED 8/9/76
Raymond F. Burghardt

The undersigned hereby consent as to the form of the foregoing Order and Final Judgment.

Dated: New York, New York
July 29, 1976

WOLF POPPER ROSS WOLF & JONES
By: Robert M. Kormeich
Attorneys for Plaintiffs
845 Third Avenue
New York, New York 10022

DIAMOND & GOLOMB, P.C.

By: Irving T. Golomb,
Attorneys with Steptoe & Johnson, Esqs.
for Defendant Canadian Javelin Limited
99 Park Avenue
New York, New York 10016

MOSES KRISLOV

By: Irving T. Golomb authorized by Moses Kirslov by telephone to sign this consent for him
Attorney of Record for Defendants
John C. Doyle and William M. Wismer
800 Engineers Building
Cleveland, Ohio 44114

APPENDIX "H"
LETTER FROM SAMUEL H. SLOAN TO JUDGE LASKER DATED AUGUST 16, 1977

Hon. Morris E. Lasker
United States District Court
Southern District of New York
Foley Square
New York, New York 10007

Dear Honorable Sir:

I am an objector to the settlement in the case of *Bonime v. Doyle*, 73 Civil 5117. Following your decision approving the settlement I appealed to the United States Court of Appeals for the Second Circuit. This appeal resulted in an order affirming your decision. Subsequently, I filed a petition for a rehearing and a suggestion that the rehearing be en banc. This petition was denied. I am presently preparing a petition for a writ of certiorari requesting the United States Supreme Court to review your decision. I expect that petition to be filed shortly.

Since I filed my notice of appearance, statement of objections and brief in opposition to the settlement on August 26, 1975, I have encountered a persistent refusal on the part of the proponents of the settlement to serve me with papers and keep me informed of the progress of the proceedings. I would like to point out that my notice of appearance contains a demand for service of all papers and briefs filed in this action. However, with the exception of a motion requesting reconsideration of your order extending my time to file a notice of appeal and an affidavit in opposition to my motion requesting that relief, the proponents of the settlement have failed and refused to serve me with even a single document or affidavit or other

paper which has been filed in this case. This is clearly improper, particularly since many of the affidavits and filed documents have borne directly on the claims that I have made and the objections which I filed with this Court. For example, Benedict Wolf filed an affidavit dated October 15, 1975 in support of the proposed settlement in which he responded specifically to the contentions which I made. One would think that since Mr. Wolf referred to me by name and discussed my contentions, he would have served me with a copy of this affidavit in order to give me the opportunity to respond. Mr. Wolf did not do so and I did not become aware of the existence of this affidavit until I perfected my appeal to the United States Court of Appeals for the Second Circuit. I would like to point out that the affidavits which Mr. Wolf filed in support of the settlement purported to contain a factual basis for approving the proposed settlement. These documents were not served on me or on any of the other objectors in spite of the fact that these affidavits were filed after the time to file objections had expired. Now that I have been able to read these documents, I have become aware of numerous false statements which Mr. Wolf made in his affidavits. I could have called these matters to your attention prior to your decision approving the settlement had Mr. Wolf served me with these documents. I would like to add that throughout the time when proposed settlement was pending before you, the affidavits which Mr. Wolf filed were held in your chambers and were not available for view in the public records section of the courthouse. As a matter of fact, I went to that section on a number of occasions and looked through the material on file there and at least once I even came to your chambers to examine the material which was available there. However, at no time did I see the affidavits which Mr. Wolf submitted in support of the proposed settlement. In addition, in December, 1976, I wrote you a letter requesting the opportunity to be heard with regard to

certain objections I was making to the way this case was proceeding. I never received a response to this letter from either you or from the proponents of the settlement. As a result, it was necessary for me to go to the expense and effort of appealing to the United States Court of Appeals in order to present objections which you refused to hear. I believe there have been numerous occasions where the proponents of the settlement have been granted an audience before you which the objectors such as myself were not informed about. The proponents of the settlement have had all the opportunities they wanted to say anything they wanted to say in your presence and yet myself and the other objectors have been completely frozen out of this case.

I am enclosing a copy of the brief I filed in the United States Court of Appeals which sets forth the basis for my objections to the procedures you have adopted. One of the points I made, which can be found on page 31 of my brief, is that under *McBroom v. Western Electric Company*, 18 Fed. Rules Serv. 2d 1200, 1203 (M.D.N.C. 1974) objectors have a right to all official filings submitted by any of the full parties during the course of this suit. This is obvious since my right to object is meaningless without the opportunity to be informed of the contentions of the proponents of the settlement. Neither myself nor any of the other objectors, with the exception of one Mr. Plotkin, have been served with even a single court filing, with the exception of the two minor items concerning the request for an extension of time to file a notice of appeal previously discussed. Apparently, Mr. Plotkin was informed by you of one of the hearings, namely a hearing which was held on July 23, 1976 which he attended. However, I have read the transcript of that hearing and I note that Mr. Plotkin also objected that he was not being served with papers and he was not being informed of prospective court dates on a timely basis.

Since your decision approving the settlement was interlocutory in that it left open matters relating to the administration of the claims, it is apparent that there will be further proceedings in this case affecting me. It is obvious that the proponents of the settlement have no intention of keeping me informed regarding these matters, and therefore I request that you order them to serve me with all future papers. In addition, I renew my request to be heard orally with regard to the matters which I set forth in my December, 1976 letter and with regard to other matters concerning my objections to the procedural aspects of this case. I would like to point out that, as I stated in my December letter, it is possible that these matters will be resolved in a way which would enable me to withdraw my appeal which at this point would relieve me of the burden of having to file a petition for a writ of certiorari, would relieve my opponents of the burden of having to respond to that petition, and would advance considerably the progress of the litigation still pending before you. Again I would like to point out that all I am requesting is the right to be heard which has been denied me and which my opponents have had all along.

Very truly yours,

s/Samuel H. Sloan
Samuel H. Sloan

cc.: All counsel

APPENDIX "I"
RESPONSE OF ROBERT M. KORNREICH
DATED AUGUST 18, 1977

Hon. Morris E. Lasker
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: Bonime v. Doyle, et al.
73 Civ. 5117 (MEL)

Dear Judge Lasker:

We have received a copy of the letter dated August 16, 1977 from Samuel H. Sloan addressed to Your Honor.

While we believe the description of certain facts and proceedings herein given by Mr. Sloan to be distorted and inaccurate, we do not believe it necessary to respond at length to his letter. Suffice it to state that, unless Your Honor otherwise advises, we intend, in accordance with the procedure which we have followed with respect to all claimants, to serve Mr. Sloan only with those papers or notices which directly relate to his claim and his request for hearing on objections to said claim. We do not intend to serve him with "all future papers" in the administration of the settlement as he apparently requests.

Respectfully,

WOLF POPPER ROSS WOLF & JONES
By: s/Robert M. Kornreich
ROBERT M. KORNREICH

RMK/g

cc: All Counsel
Mr. Samuel H. Sloan

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-374

SAMUEL SLOAN,

Petitioner,

—against—

GERTRUDE J. BONIME, LILLIAN OLDEN, JOHN C. DOYLE, WILLIAM M. WISMER and CANADIAN JAVELIN LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS BONIME AND OLDEN IN OPPOSITION

BENEDICT WOLF
Counsel for Respondents
Gertrude Bonime and Lillian Olden
845 Third Avenue
New York, New York 10022

ROBERT M. KORNREICH
WOLF POPPER ROSS WOLF & JONES
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Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-374

SAMUEL SLOAN,

Petitioner,

—against—

GERTRUDE J. BONIME, LILLIAN OLDEN, JOHN C. DOYLE, WILLIAM M. WISMER and CANADIAN JAVELIN LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS BONIME AND OLDEN IN OPPOSITION

Questions Presented

1. Was a "tentative settlement class" created in this case?

2. May a plaintiff who was a member of a designated class when an action was commenced and when the class was determined, but by the terms of a settlement reached thereafter will not participate in the settlement fund, continue to act as one of the class representatives?

3. Did the Notice sent to members of the class meet the requirements of Rule 23 of the Federal Rules of Civil Procedure and of due process?

4. Did the District Court have the authority to bar further lawsuits by class members based upon any cause of action arising from the matters alleged in the complaint in this action?

5. Is the class created in this case manageable and maintainable under Rule 23 of the Federal Rules of Civil Procedure?

6. Was the Petitioner entitled to service of any papers beyond those relating to his objections to the proposed settlement?

7. Was the action of the Court of Appeals in deciding the appeal brought by respondent, rather than dismissing the appeal or remanding it to the District Court, an abuse of discretion?

Statement of the Case

By a complaint filed December 3, 1973, plaintiff Bonime, a purchaser of stock of Canadian Javelin Ltd. ("Javelin"), commenced a class action against Javelin and its principal officers, John C. Doyle and William M. Wismer, on behalf of all purchasers of Javelin stock similarly situated during the period of wrongful action alleged in the complaint. Plaintiff Olden was added as a plaintiff on December 11, 1974.

The amended complaint alleged that defendants had disseminated false and misleading statements in violation of Section 10(b) of the Securities Exchange Act of 1934, as amended, and Rule 10b-5 promulgated thereunder, of Sections 17 and 5 of the Securities Act of 1933 and of the common law, and that these false and misleading statements had resulted in the artificial inflation of the market price

of Javelin stock. Plaintiffs sought for themselves and the other members of the class damages resulting from their having purchased Javelin stock at a price substantially higher than what the stock was worth. The class sought consisted of all purchasers of Javelin stock during the period from April 30, 1969 to October 25, 1973.

A motion for class determination was made on January 22, 1975, and the Court certified the class on February 10, 1975, the class certified being the same as that which had been described in the complaint a year earlier.

After pretrial discovery, which consisted of examination of documents, answers to interrogatories and deposition of witnesses, settlement negotiations resulted in the entry into a stipulation of settlement on July 9, 1975, about five months after the class had been certified, and about six months after the motion for class determination had been made.

Pursuant to court order, a notice was sent to all members of the class by mail, and was published in three newspapers of wide circulation in the United States and Canada. It described the class which had been fixed by the Court on February 10, 1975, set forth the nature of the action and the proceedings had to that time, gave a brief summary of the terms of settlement and notified the class members of a hearing to be held on October 17, 1975 to determine whether the proposed settlement should be approved by the Court as fair, reasonable and adequate. The class members were informed that they had the right to "opt out" of the class and the settlement on or before October 7, 1975, the right to object to the settlement on or before September 29, 1975 and, if they did not wish to opt out, the right to enter an appearance in the case through their own counsel. The notice informed the class members that the defendants would pay the settlement fund in cash (although the Stipu-

lation gave them the right to pay either in cash, or partly in cash and partly in stock or warrants), and that one-third of the fund would be distributed to the claimants who purchased between April 30, 1969 and May 31, 1972 (First Class Period) and two-thirds to those who purchased in the period from June 1, 1972 through October 25, 1973 (Second Class Period). The notice also informed the members of the class of the amount of fees which would be sought by plaintiffs' counsel if the settlement were approved.

The notice concluded by stating that the references to the pleadings, settlement agreement and other documents were only summaries, and that for a complete description of the various papers reference was made to the underlying documents, the complete texts of which were on file with the Clerk of the United States District Court for the Southern District of New York, where they were available for inspection and copying.

Petitioner filed a Notice of Appearance dated August 20, 1975, stating his intention to appear at the hearing and seek disapproval of the settlement, a determination that a class action could not be maintained and a dismissal of the complaint with prejudice. In a brief supporting affidavit, Petitioner seemed to base his objections primarily on his concern that he would receive a warrant of little value (although the Notice stated specifically that the settlement fund would be all cash). He also asked that the Court disallow any claim by plaintiffs' attorneys for counsel fees.

Petitioner failed to appear at the hearing to press his objections, and took no further action in this matter, nor did he evince any further interest therein until after entry of the Order and Final Judgment on July 29, 1976, approving the settlement. Meanwhile, the attorneys for the proponents of the settlement had filed affidavits dated October

8, October 9 and October 15, 1975, and two objectors, through their attorneys, had filed papers in opposition. All of these were the subject of lengthy oral presentation to the Court at the hearing on October 17. At the hearing, in addition to oral argument, witnesses were examined and cross-examined, and a few objectors who were present were given full opportunity to make statements of their position.

Thereafter, the attorneys for the two active objectors and the attorneys for the proponents of the settlement exchanged additional affidavits and participated in further arguments before the Court. The objections presented by these objectors dealt with fundamental questions of whether the proposed settlement was fair and whether the procedural steps that had been followed complied with due process.

On June 30, 1976, the District Court rendered an opinion overruling the objections to the settlement and approving the settlement (Petition, pp. 6a-38a), and on July 29, 1976 the Court issued its "Consent Order and Final Judgment" (Petition, pp. 68a-74a).

On October 4, 1976, Petitioner filed a Notice of Appeal from the District Court's order within an extended period granted by the Court, having failed to file within the 30-day period allowed for appeals. His appeal was fully briefed by Petitioner and by the Respondents. Hearing was set for April 6, 1977, at which time the attorneys for the Respondents appeared for argument but the Petitioner failed to appear.

The Court of Appeals affirmed the judgment of the Court below approving the settlement, finding that, on the standards set forth in *State of West Virginia* v. *Chas. Pfizer & Co.*, 440 F.2d 1079, 1085 (2d Cir.), *cert. denied sub nom., Cotler Drugs* v. *Chas. Pfizer & Co.*, 404 U.S. 871 (1971), the

evaluation by the District Court of the proposed settlement was plainly sufficient and proper. Thereafter, Petitioner filed a petition for rehearing, with a suggestion that the rehearing be *en banc*. This petition was denied.

Petitioner now asks this Court to review, by Writ of Certiorari, the unanimous decision of the Court of Appeals.

ARGUMENT

POINT I

No "Tentative Settlement Class" Was Established in This Case.

Petitioner devotes approximately a third of the argument portion of his brief to an attack on the alleged adoption in this case of the "Tentative Settlement Class" procedure, charging that it was a violation of due process principles and Rule 23 of the Federal Rules of Civil Procedure (Petition, pp. 20-27). The short answer to his argument is that no such procedure was adopted in this case.

While the Manual for Complex Litigation (§ 1.40) states that "[r]ecent experiences demonstrate that in no event should there be a tentative determination of a class action request for *the purposes of settlement*" (emphasis supplied), it proceeds to state, in footnote 23, that:

> "This statement is not intended to apply to separate prior determination of class members and separate later notices to classes of proposed settlement with provision for subsequent hearing on the fairness of the proposed settlement and with reservation of full power of the court to reject the settlement in whole or in part,"

citing the procedure followed in *State of West Virginia* v. *Chas. Pfizer & Co. Inc.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied sub nom., Cotler Drugs, Inc.* v. *Chas. Pfizer & Co. Inc.*, 404 U.S. 871 (1971).

In the instant case, a motion for class action determination was made on January 22, 1975. The motion was granted on February 10, 1975, and the class was thus determined, as even Petitioner admits, before any settlement negotiations commenced. He gives the commencement date as March 5, 1975 (Petition, p. 8). Actually, settlement was reached on July 9, 1975, about six months after the class was fixed. Obviously, no "tentative settlement class" was ever created, and the determination of the class was never dependent on whether a settlement would be reached.

This was clearly a case where, in the language of the Manual for Complex Litigation quoted above, there was a "separate prior determination of class members" and the notice of proposed settlement provided for "subsequent hearing on the fairness of the proposed settlement" with the Court having full power to reject the settlement, thus at the very least meeting the test of *State of West Virginia* v. *Chas. Pfizer & Co. Inc., supra.*

POINT II

Plaintiff Bonime Was a Proper Class Representative.

While we are reluctant to deal with the many misstatements and the statements not in the record with which the Petition is replete, we deem it necessary to point out that for Petitioner to assert that plaintiff's counsel could have known, when the action was started on December 3, 1973, or when the motion for class certification was filed on January 22, 1975, that Bonime would, in July 1975, under a formula later to be adopted, be unable to claim "dam-

ages," borders on the ridiculous. The complaint was filed on behalf of all purchasers of stock in Javelin from April 30, 1969 through October 25, 1973. Bonime admittedly bought on May 27, 1970 (Petition, p. 14). The class was fixed as all purchasers of the stock in the period from April 30, 1969 through October 25, 1973. Thus, Bonime was a member of the class both when the complaint was filed and when the class was fixed. It was not until a formula for measuring damages was agreed upon and put into the stipulation of settlement, on July 9, 1975, that a determination of whether any particular class member, Bonime or anyone else, would be entitled to share in the settlement fund, could have been made.

In any event, whether under the formula, which fixed particular cutoff dates for the measurement of losses, Bonime can share in the fund, does not affect her right to act as a plaintiff-representative of the class. The ability of a plaintiff to prove the merits of his individual claim or his entitlement to relief is not determinative of his status as representative of the class. *Sosna* v. *Iowa,* 419 U.S. 393 (1975); *Frost* v. *Weinberger,* 515 F.2d 57 (2d Cir. 1975); *Huff* v. *N. D. Cass Company of Alabama,* 485 F.2d 710 (5th Cir. 1973). As was pointed out in *Dorfman* v. *First Boston Corporation,* 62 F.R.D. 466 (E.D. Pa. 1974), for a class representative to have to show damages at the time the class was formed:

> ". . . would mean that before deciding a Rule 23 motion in an action for damages, a court would invariably have to determine whether the putative class representative had himself suffered damages. In other words, an allegation of damages in the complaint would in effect transform a class action motion into a motion for summary judgment as to the representative plaintiff's damages." (62 F.R.D. at 472.)

The cases cited by Petitioner in support of his challenge to Bonime as a class representative (Petition, p. 17) are clearly inapposite.

There is no serious challenge to plaintiff Olden's status, and the fact that Bonime accepted a settlement in which she might not be able to participate shows clearly that she was indeed able to represent the class properly.

Finally, Petitioner supplies no authority for his novel theory that an objector to a settlement has standing to request, not rejection of the settlement, but *dismissal* of an action or any part of it.

POINT III

The Notice to Members of the Class Met the Requirements of Rule 23 of the Federal Rules of Civil Procedure and of Due Process.

Disregarding, as we must, Petitioner's completely unsupported speculation set forth in his Petition (pp. 30-32) as to the percentage of recovery of losses, and his misstatement about whom Judge Lasker permitted to speak at the hearing at which Petitioner was not present (Petition, p. 32), we come to the one basic question he raises: Was the Notice deficient because it did not contain "an estimated range of monetary recovery (e.g., amount per share, per unit, per dollar charged, and the like) that members of the class may expect to receive if the settlement is approved," as the Manual for Complex Litigation suggests?

There was no conceivable way in which the Notice for class members, sent out on August 14, 1975, in which they were told how to submit their claims, could have included that information. Class members were given until January 16, 1976 to file claims. The total fund was fixed—

$1,350,000, less $260,000 or whatever lesser amount the Court would allow as counsel fees—and was set forth in the Notice. But, certainly, on August 14, 1975, and in fact at any time before January 16, 1976, there was no way of knowing or even estimating how many claims would be filed, for what amounts or what portion of the individual claims would be allowed. Without this knowledge, it would have been foolhardy to make any estimated range of monetary recovery that class members could expect to receive if the settlement would be approved.

The objection that the Notice did not set forth what percentage each defendant would contribute to the settlement fund or that Javelin would pay it all, is frivolous. This is a class action, not a derivative action. The concern of the members of the class is that the money be paid into the fund, not its source. If some of the members of the class are also still stockholders of the company and have grounds to object to the company's paying the full amount of the judgment, they have a remedy in a derivative action, but not in this case.

An examination of the Notice (Petition, pp. 54a-63a) shows that it is in full compliance with the required standards, which have been well described in *Grunin* v. *International House of Pancakes*, 513 F.2d 114 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975).

POINT IV

The Court Had the Authority to Bar Further Lawsuits by Class Members Based Upon Causes of Action Arising From the Matters Alleged in the Complaint in This Action.

Petitioner's position that a court, in a class action, cannot enjoin members of the class who have not appeared "and who may not even know about the existence of this action" (Petition, p. 33) from starting suit against the defendants based upon any cause of action alleged in a complaint, if adopted by the Court would seriously lessen the value of class actions, since matters could never be finally put to rest, and would make settlement of such actions all but impossible. The power of courts to enjoin further lawsuits by members of the class where they have received notice of the class action (as they have in this case) is well established. *Berry Petroleum Co.* v. *Adams & Peck*, 518 F.2d 402, 412 (2d Cir. 1975); *Grunin* v. *International House of Pancakes*, 513 F.2d 114, 120 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975).

POINT V

The Class Created in This Case Was "Manageable and Maintainable" Under Rule 23 of the Federal Rules of Civil Procedure.

Petitioner supplies only one basis for his assertion that the class is "unmanageable and unmaintainable," the "lengthy time period over which plaintiffs allege that [the] fraudulent non-disclosures took place" (Petition, p. 28). This period he describes in the fourth of his "Questions Presented" as a period of four and one-half years (Petition, p. 3).

Clearly, a period of this duration not only is manageable, but, as is apparent from Petitioner's failure to supply any factual support for his position, was managed without particular difficulty in this case.

Judge Sneed's concurring opinion in *Green* v. *Occidental Petroleum Corp.*, 541 F.2d 1335, 1342 (9th Cir. 1976), cited by Petitioner, does not deal with the issue he raises.

POINT VI

Petitioner Was Served With All Papers Necessary to Meet the Requirements of Due Process.

It is important to be clear about Petitioner's status. He was not a party to the case, nor did he seek, by intervention, to become a party to the case. He filed objections to the settlement on what he describes as "procedural matters" and inadequate notice (Petition, p. 10) and did not object to the fairness of the settlement. Although he asserted in his Notice of Appearance that he would appear at the hearing on October 17, 1975, by which time the

papers in support of the settlement were on file and available for inspection, and at which time objectors had the opportunity to present their objections and present witnesses to bolster their position, listen to the presentation by proponents of the settlement and attack this presentation to their heart's content, an opportunity which several of the objectors utilized fully, Petitioner chose neither to appear nor to participate. All the papers in the case were on file either in the Office of the Clerk of the Court or in the chambers of the Judge considering the matter, and were available for inspection.

Nothing further was heard from Petitioner, nor was there any indication that Petitioner had any interest in the proceedings, until after the District Court approved the settlement. Even then, during the regular time to appeal, Petitioner was silent. Only after the time to appeal had expired, on July 30, 1976, for the first time since August 1975, did Petitioner evince an interest in the matter, by requesting and receiving an extension of time to file a Notice of Appeal.

He was given full opportunity to present his position to the Appellate Court, and in his brief raised many questions that he had not urged upon the court below. He had the opportunity to make oral presentation to the Appellate Court, but chose not to show up on the date of argument, not bothering to inform the appellees that he would not appear.

Meanwhile, as Petitioner concedes, the objections he urged before the Appellate Court, and now presents, were vigorously and ably urged upon the District Court by an attorney for two other objectors (Petition, p. 11), and, as is apparent from the District Court's decision, were fully considered.

We submit that, in view of these circumstances, the fact that papers were not served upon Petitioner did not constitute a violation of due process.

POINT VII

Since the Judgment of the Lower Court Was a Final Judgment, the Action of the Court of Appeals in Deciding the Appeal, Rather Than Dismissing It or Remanding It to the District Court, Was Proper.

Petitioner now asserts that the Court of Appeals erred because it did not dismiss his appeal (presumably not on the merits) or remand it to the District Court, on the ground that the judgment was not a final judgment on the merits. Despite the reservation of jurisdiction over peripheral matters, the Court of Appeals had before it a final judgment, and proceeded in its determination on that basis.

The procedure followed by the District Court in entering the Order and Final Judgment approving the settlement and dismissing the action while reserving jurisdiction over the effectuation of the settlement and application for counsel fees is the procedure regularly followed by district judges and approved by appellate courts. *State of West Virginia* v. *Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir.), *cert. denied sub nom., Cotler Drugs* v. *Chas. Pfizer & Co.*, 404 U.S. 871 (1971); *In re National Student Marketing Litigation*, 68 F.R.D. 151 (10th Cir. 1974). It is the only practical way in which settlements can be consummated, since, until final judgment, parties would be unwilling to take the actions required by the terms of the settlement. To require that the parties undertake the tasks of processing claims, or of holding hearings on disputed claims, before knowing whether a settlement is finally approved, is to place upon them unnecessary burdens, unnecessary because

what are involved are matters peripheral to the basic questions—was the settlement fair, and were the requirements of due process met?

The fact that a lower court reserved jurisdiction to make further orders after judgment makes the judgment no less final. *Baughman* v. *Cooper-Jarrett, Inc.*, 530 F.2d 529, 531 n. 2 (3rd Cir. 1976); *Durkin* v. *Mason & Dixon Lines*, 202 F.2d 425 (6th Cir. 1953); *Kasishke* v. *Baker*, 144 F.2d 384 (10th Cir. 1944).

Since the judgment was final and Petitioner did not withdraw his appeal, the refusal of the Court of Appeals to "dismiss" his appeal or remand the case to the District Court, but instead to proceed to a determination on the merits, was proper.

CONCLUSION

Petitioner has presented no valid reasons why his Writ should be granted. His claim that the Court of Appeals decision is in conflict with the applicable decisions of this Court is without any support in his papers. He fails to state which "applicable decisions" he refers to. His grave charge against the Court of Appeals that it has acted in such a manner as to call for the exercise of this Court's power of supervision (Petition, p. 13), again without a single supporting fact or even argument, is unworthy of attention.

Absent sound reason for review, we must be guided by the words of Chief Justice Taft, commenting on this Court's certiorari jurisdiction, when he said, "[t]he jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another

hearing." *Magnum Import Co.* v. *Coty*, 262 U.S. 159, 163 (1923).

For the reasons stated, the petition for a writ of certiorari should be denied.

September 21, 1977

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1977
No. 77-374

SAMUEL SLOAN,

Petitioner,

-against-

GERTRUDE J. BONIME, LILLIAN OLDEN, JOHN C. DOYLE, WILLIAM M. WISMER and CANADIAN JAVELIN LIMITED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT CANADIAN JAVELIN LIMITED IN OPPOSITION

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BRIEF FOR RESPONDENT CANADIAN JAVELIN LIMITED IN OPPOSITION

STATEMENT

Respondent, Canadian Javelin Limited, one of the three defendants in this class action, was party to a settlement of this action. It vigorously supported the settlement upon the hearing conducted by the District Court. Upon appeal to the Second Circuit Court of Appeals, it urged the propriety and fairness of the settlement and the adequacy of notice to the class. The Second Circuit unanimously affirmed.

The instant petition for certiorari is brought by an objector to the settlement who not only failed to appear at the hearing to press his objections but who was inactive in this litigation until the approval of the settlement. He brings on his certiorari petition after the rejection of his proof of claim below.

The other relevant facts are sufficiently set forth in the brief for the respondents

Bonime and Olden submitted in opposition to the petition for certiorari.

Petitioner's contention is that his petition should be granted because the decision of the United States Court of Appeals for the Second Circuit has decided a Federal question in such a way as to conflict with applicable decisions of the Supreme Court and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. His brief fails, however, to offer any support whatever to these contentions.

Accordingly, in order to avoid burdening this Court with repetitious arguments, respondent Canadian Javelin Limited joins in and rests upon the points set forth in the brief for respondents Bonime and Olden

submitted in opposition to the petition for certiorari.

Dated: October 3, 1977.

Respectfully submitted,

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